TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 529 Book 51

MILTON C. MITCHELL, PLAINTIFF IN ERROR,

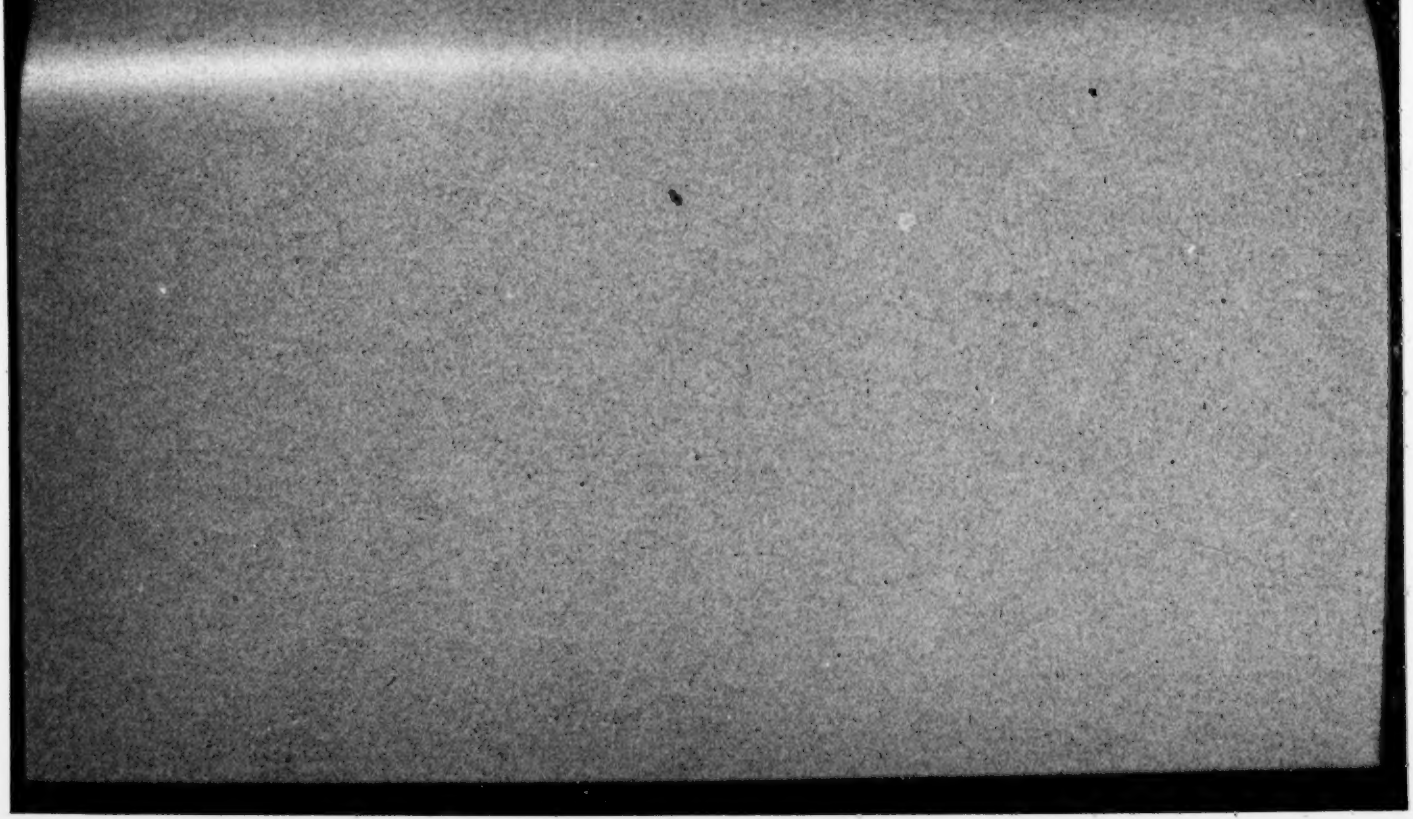
vs.

THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 5, 1900.

(17,737.)



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THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C.

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1 In the Court of Appeals of the District of Columbia.

MILTON C. MITCHELL, Appellant,
vs.
THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C., a Corporation. } No. 949.

Supreme Court of the District of Columbia.

MILTON C. MITCHELL
vs.
THE POTOMAC INSURANCE COMPANY OF Georgetown, D. C., a Corporation. } No. 41240. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed July 17, 1897.

In the Supreme Court of the District of Columbia.

MILTON C. MITCHELL, Plaintiff,
vs.
THE POTOMAC INSURANCE COMPANY OF Georgetown, D. C., a Corporation, Defendant. } At Law. No. 41240.

The plaintiff sues the defendant, a corporation, for money payable by the defendant to the plaintiff for that whereas, heretofore, to wit, on or about the third day of February, A. D. 1893, by a certain deed poll or policy of insurance, signed for and on behalf of said defendant corporation by H. M. Sweeny, its president, and sealed with its corporate seal, attested by J. H. Bradley, its secretary, the said H. M. Sweeny and J. H. Bradley being duly authorized in that behalf (and which said deed poll or policy, so signed and sealed, the plaintiff here brings into court), after reciting that said plaintiff had paid to said defendant corporation fifty dollars, assuring from loss or damage by fire the sum of five thousand dollars on his, said plaintiff's, stock of stoves and their findings, tins and tin-
2 ware, tools of trade and such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C., with the privilege granted to keep not more than five barrels of gasoline or other oil or vapor; and it was made known by the said deed poll or policy that from the said 3d day of February, A. D. 1893, at noon, till the 3d day of February, A. D.

1894, at noon, the said defendant corporation would pay and make good to the said plaintiff, Milton C. Mitchell, and his legal representatives, all such damage or loss which the said Milton C. Mitchel should suffer by fire to the aforesaid stock and chattels, not exceeding $5,000.00 in the whole or respectively, as aforesaid; nevertheless it was thereby declared that said assurance was made and granted, subject to all the covenants and conditions therein contained, as by the said deed poll or policy of insurance, reference being thereunto had, will more fully appear, and the plaintiff says that from year to year he paid to the defendant corporation the yearly premiums for the renewal of said deed poll or policy of insurance, the last of said premiums, to wit, the sum of $72.50, being paid to and accepted by the defendant corporation on or about the 8th day of August, A. D. 1896, in full payment for the year ending the 3d day of February, A. D. 1897, at noon; and the said plaintiff in fact further says that he, at the time of the making of said deed poll or policy of insurance, as aforesaid, and from thence until the loss and damage hereinafter mentioned, was solely, entirely, and unconditionally interested in the said assured stock of stoves and their findings, tins and tinware, tools of trade, and other goods kept for sale in said premises, and that he never at any time during said period kept in said premises gasoline or other oil or vapors in larger quantities than five barrels, and the said stoves and their findings, tin and tinware, tools of trade, and other stock of goods in said deed poll or policy of insurance mentioned, afterwards, to wit, on or about the 28th day of September, A. D. 1896, were burnt, consumed, and destroyed by fire, which did not happen by invasion, insurrection, riot, civil commotion, military or usurped power, whereby the plaintiff then and there sustained damage and loss to a large amount, to wit, to the amount of $5,000 assured on the said chattels, goods, stock in trade, and effects so burnt, consumed, and destroyed; and the plaintiff further says that the said chattels, goods, stock in trade, and effects in said deed poll or policy mentioned at the time of the making of said deed were not, nor at any time since, have been assured in any other company; and the plaintiff further says that said chattels, goods, stock in trade, and effects in said deed poll or policy mentioned were truly described and not otherwise than they really were or so as to cause the said insurance to be effected upon a lower premium than ought to have been; and the said plaintiff did forthwith after the loss and damage, to wit, on or about the first day of October, A. D. 1896, notify the defendant corporation of such loss and damage, and also did, on or about the 19th day of November, A. D. 1896, deliver in an account stating the particulars of such loss, on oath, and was ready and willing to prove
3 the same by the production of his books and such other documents and vouchers as defendant corporation should reasonably require, and did, on the day and year last aforesaid, claim of and from said defendant corporation the amount of said loss and damage; and the plaintiff further says that although he, said plaintiff, has, in all things, conformed himself to and observed all and singular the said articles, stipulations, conditions, matters, and

things which on his part were to be observed and performed according to the form and effect of said deed poll or policy of insurance, yet the defendant did not nor would not pay or make good to the plaintiff the said loss and damage or any part thereof, but although thereunto frequently requested, has declined and refused to pay the same, and the same remains wholly unpaid and unsatisfied to him, said plaintiff, contrary to the force and effect of the said deed or policy and of the covenant of said defendant corporation therein in that behalf made as aforesaid.

And the plaintiff claims the sum of $5,000, with interest thereon from the 19th day of November, A. D. 1896, besides the costs of suit.

SAM'L MADDOX,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

SAM'L MADDOX,
Attorney for Plaintiff.

Pleas.

Filed August 2, 1897.

In the Supreme Court of the District of Columbia.

MILTON C. MITCHELL
vs.
THE POTOMAC INSURANCE COMPANY OF Georgetown, D. C. } At Law. No. 41240.

For pleas to the declaration filed herein by the plaintiff the defendant says:

1. It never was indebted as alleged.

2. And for further plea the defendant denies that on or about the twenty-eighth day of September, A. D. 1896, the goods, chattels, stock in trade, and effects of the plaintiff upon the premises, to wit, No. 3108 M street, Georgetown, D. C., were burnt, consumed, and destroyed by fire, as alleged, whereby the plaintiff then and there sustained damage and loss to the amount of twenty-five hundred ($2,500.00) dollars; and the defendant further denies that by reason of any such fire it became liable to pay to the plaintiff the said sum of twenty-five hundred dollars, as claimed, or any other sum.

4 3. And for further plea the defendant says that any damage or loss to the goods, chattels, stock in trade, and effects of the plaintiff by him sustained, as alleged, on the said 28th day of September, A. D. 1896, if any damage was by him sustained to his said goods, chattels, stock in trade, and effects, as claimed, were the result of an explosion, and not the result of fire, as alleged, and that the defendant was not and is not liable under any policy of

insurance by it issued to the plaintiff for any part of such damage so sustained.

GORDON & GORDON,
Attorneys for the Defendant.

Joinder of Issue.

Filed August 28, 1897.

In the Supreme Court of the District of Columbia.

MILTON C. MITCHELL, Plaintiff,
vs.
THE POTOMAC INSURANCE COMPANY OF Georgetown, D. C., a Corporation, Defendant. } At Law. No. 41240.

The plaintiff hereby joins issue upon the defendant's pleas.

SAM'L MADDOX,
Attorney for Plaintiff.

Memoranda.

January 30, 1899.—Leave granted plaintiff to amend his declaration by striking out, on the third page thereof, the figures "$2,500," and inserting therefor the figures "$5,000;" and striking out, on the fourth page of said declaration, the figures "$2,500," and inserting therefor the figures "$5,000."

October 16, 1899.—Verdict for defendant.

Supreme Court of the District of Columbia.

FRIDAY, *November* 10, 1899.

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

MILTON C. MITCHELL, Plaintiff,
vs.
THE POTOMAC INSURANCE COMPANY OF Georgetown, D. C., Defendant. } At Law. No. 41240.

This cause coming on to be heard upon the plaintiff's motion for a new trial, and the same having been heard, it is considered that the said motion be, and it is hereby, overruled and judgment on verdict ordered. Therefore it is considered that the
5 plaintiff take nothing by his suit and the defendant go thereof without day and recover against the plaintiff its costs of defence herein, to be taxed by the clerk, and have execution thereof.

Whereupon the plaintiff in open court notes an appeal to the Court of Appeals, and upon motion the penalty of the appeal bond is fixed at one hundred dollars ($100).

November 14, 1899.

In the Supreme Court of the District of Columbia.

MILTON C. MITCHELL
vs.
THE POTOMAC INSURANCE COMPANY OF Georgetown, D. C. } At Law. No. 41240.

Now again comes here the plaintiff, by his attorney, and tenders to the court here his bill of exceptions taken during the trial of this cause and prays that it may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

Plaintiff's Bill of Exceptions.

Filed November 15, 1899.

In the Supreme Court of the District of Columbia.

MILTON C. MITCHELL
vs.
THE POTOMAC INSURANCE COMPANY OF Georgetown, D. C. } At Law. No. 41240, Doc. —.

Be it remembered that at the trial of this cause the plaintiff, to maintain the issues on his part joined, offered in evidence a policy of insurance issued by defendant company to the plaintiff, wherein it is recited that, in consideration of the sum of fifty dollars ($50), the defendant company do insure the plaintiff and his legal representatives five thousand dollars ($5,000) on property designated as follows, in writing on the face of the policy: "On his stock of stoves and their findings, tins and tinware, tools of trade and such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C."

"Privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor."

The policy is in the usual form and contains the following printed provision:

"Against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from the 3d day of February, 1893, at twelve o'clock noon to the 3d day of February, 1894, at twelve o'clock noon; to be paid sixty days after due notice and satisfactory proofs of the same,
6 made by the assured, are received at the office of the company."

In finer print are the following conditions amongst others:

"It being covenanted as conditions of this contract that this company * * * shall not be liable * * * for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only."

"Or if gunpowder, phosphorus, nap-tha, benzine, or crude earth

or coal oils are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time without written consent, or if the risk be increased by any means within the control * * * of the assured, this policy shall be void."

It was admitted that the policy so offered in evidence had been renewed from time to time, and was in force on the 28th day of September, 1896.

Thereupon the plaintiff further gave evidence by one JOSEPH A. OLIVER, who testified, on direct examination, as follows:

I am the book-keeper, clerk, and general manager for Milton C. Mitchell, and have been employed by him for over fifteen years. During the year 1896 he conducted a business at 3108 M street in a two-story and attic brick structure. His stock consisted of stoves and tinware, and he did besides a general repairing business. In front of the building there was a cellar door three or four feet wide projecting into the street and built on an incline of eight or nine inches. The base of it was about two inches above the pavement (1). There were two swinging doors, made of ⅞-inch pine stuff. These doors were not used as an entrance to the cellar, but as a means of getting heavy goods into it down a skid-board. In the daytime the doors were used as a sort of display place for light tinware. There was no glass or light through these doors, and there was no other opening in the front part of the cellar through which light could get (3). The first floor was used as a store-room. The openings into this room consisted of a door about four feet wide and two old-fashioned bay windows, also about four feet wide. The store-room, which covered the entire first floor, was about seventeen feet on the inside. In this store-room, we kept stoves and tinware and samples, besides smaller things. In the back part of the room space was set apart for an office (4). The store-room was about forty feet deep; then there was just back of the main store a small room, where other goods were stored and where was situated the pumping apparatus for the gasoline tank. This was in the back building. Still further back, on a line lower than the store floor, was our repair shop. There was a small opening between the front and back store, but no door. The gasoline tank was underneath the back-cellar floor. It was filled by syphoning the gasoline from barrels into a pipe which came through the floor of the back store. This pipe led from the store floor into the tank. Customers were supplied with gasoline from a pump which was also operated in the back store (5). On the second floor we had a
7 large stock of vapor stoves and a quantity of castings and tinware that were piled throughout the rooms. In the third floor we had a still heavier line of goods—stove castings and brick and tinware as well (8). There were three or four 3 x 6 windows in the front wall of the second store. In the attic there were two dormer windows. The only way of getting into the cellar was down some steps from the outside in the rear of the front store. There were no gas jets in the cellar (9) and no artificial lighting of any kind.

When near the door we could see without the use of a match or candle or any other light, but seven or eight feet away it was necessary to have artificial light of some kind. In the front cellar we kept stove castings and brick and the surplus of stoves and ranges. Along the sides shelving was arranged, on which brick and castings were put. The heavy goods were unpacked in the cellar. They usually came in parcels, tied with tarred string, and when unpacked the strings were cut and left where cut (10). They were inflammable, and besides there was more or less rubbish, paper, and excelsior on the cellar floor. The house was heated by a furnace in the cellar, six feet back from the door. The furnace had an ash box two or three inches above the cellar floor. We never had any trouble with the gasoline vapor from the furnace or from matches or candles with which we used to light ourselves about. We frequently had half a dozen candles (11) setting around on the floor when we had much work to do. Between the front and back cellar there was an opening, but no door. The back-cellar floor was fifteen or sixteen inches higher than the front-cellar floor. The opening between the cellars had a door-sill about four inches high, set in stone and mortar. The top of this sill was four inches higher than the level of the back-cellar floor. But for this opening there was a solid brick wall between the front and back cellar. The back cellar was used for like purposes as the front cellar, except that we never put stoves there (12). It was not lighted except by a small window out into the alley. Matches and candles were used in the back cellar as in the front. When the workmen found what they might be looking for, it was customary to drop these charred matches on the floor or put them on the stoves or castings. The Saturday preceeding the fire the gasoline in the tank ran low. We ordered five barrels that afternoon, but only one was sent, which was put into the tank, after which we continued to sell gasoline during the rest of Saturday, which was our busy day. The gasoline tank was practically empty on the Monday following, when four barrels were syphoned into it after eleven o'clock. The tank held five barrels. It was made of galvanized sheet iron, sunk five feet in the ground, and had an iron top. This was fifteen inches below the surface of the ground (14). It was covered with earth, and on top of that cement was placed. Mr. Mitchell dealt quite largely in gasoline. On Monday, the 28th of September, Mr. Lenz, a customer, called for a particular piece of casting. No one was in the store but myself, and the casting called for was in the cellar. I went for it down the back-cellar steps. It was about one o'clock in the day. When I went down there
8 was no odor of gasoline in the cellar. I know the odor, which is pungent, unmistakable and easily detected (15). The particular piece of casting that was wanted was in a tier of bins in the shelving on the east side of the main cellar and about fifteen feet from the back cellar. It was so far from the door that I could not see it without the use of a light. On reaching the tier I struck a match and looked in the particular place where we were accustomed to keep this kind of casting; but it was not there. As I had been away from the store for three

weeks previous and did not know to what bin in the shelves they had been moved, I started looking from one to the other, beginning near the top. The first match burned my fingers, and I dropped it and lit another, with which I continued my search down, when all of a sudden the place was enveloped or filled with this blue flame. It was a bluish color, and I knew at once that it was gasoline vapor that had ignited. I knew it at once because I remembered the appearance of it—had seen it before. "Where it started I do not know; but the first I knew of it, it was all over the place and I was in the midst of it." I don't know distinctly whether the blaze started at my hand or not (16). When I became conscious of the fact that there were flames there, it was all over the place; not only where I was, but all over the cellar. I noticed it first all over the cellar. There was no noise connected with it, except the sh-sh-sh like the swish of a whip or anything of that kind. I could see it play around. I became unconscious, either from the burns or the walls falling on me, I don't know which. "The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and, knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. I crawled towards the front, where I was pulled through the front wall." I had been protected from the debris by the way in which the joists fell. They broke in the middle, one end remaining in the east wall and the other resting on the floor (17), thus leaving a little angle at the side. This condition existed all the way to the front of the building. It was very dark—like the darkness of Egypt. The brickwork was shattered in front and the house had fallen down. I was very badly burned, and did not get back to the store for three weeks. The debris had then been taken out and the place cleared up (18). The back-cellar door was always left open in the daytime, and it was the only means of lighting the front cellar (19). I have experimented with gasoline vapor in a simple way to show customers that when gasoline is confined in a tank or closed vessel it is perfectly safe. These experiments showed that it is impossible to ignite gasoline so enclosed. The vapor escaping through an opening in the vessel in which gasoline is confined could be lighted, but the flame could not be forced down to the gasoline itself (20). The vapor burned on the surface with a small blue flame appearing just where the vapor escaped from the can. A matted wire that will hold the fluid can be put down through the burning vapor into the can and brought back all aflame. If again inserted in the can you can hear it sizz as it goes down when passing below the surface of the opening. I have frequently taken a five-gallon can and set the vapor afire at the spout and poured the gasoline through the flame into a basin; the vapor would continue to burn at the spout, and the stream of gasoline, as it passed into the basin, would be afire, but you could put the gasoline back into the can, put the cap on the spout, and all the fire would go out. A gasoline stove could be ignited at the filler opening and gasoline might flow over the stove and take fire, but no damage would be done (21). The color of the flame of burning

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gasoline vapor is blue, and the kind of flame I saw in the cellar the day the fire or accident occurred (22). I did not notice any fire in the back cellar as I went into the front cellar the day of the accident. I was going in the direction opposite to the back cellar. The joists separating the store floor were very old and a condition of dry rot existed in most of them. It was a frequent occurrence for Mr. Mitchell, myself, and other employés to light matches and candles in the cellar (23). This was more frequent in busy seasons of our work than at other times in the year, and September is one of our busiest months. In the summer time some one or other of us went into the cellar possibly once an hour; in busy seasons, as often as once in fifteen minutes on an average.

After the accident the gasoline tank was in good condition (25).

The pumping machinery connected with the gasoline tank was in the rear store-room, being three feet from the door, which was always open during the day in the summer time. We had complaints once from our neighbors that they smelled gas. To my knowledge, the neighbors on the east did not complain of the smell of gasoline in their cellars (26).

I paid $72.50 as a renewal premium in the year 1896 for Mr. Mitchell's policy. Of this amount the company charged fifty cents on the $100 for the privilege of keeping gasoline. This made the gasoline privilege on the $5,000 policy cost $25 (27).

The loss suffered by Mr. Mitchell from the collapse of his building amounted to $4,568.80. (Here the witness submitted stock book, invoices, and other items showing how this loss was arrived at.)

On cross-examination the witness testified as follows:

The occurrence took place on Monday afternoon about one o'clock, and I had returned to work on the Saturday morning previous. I did not notice that day any odor of escaping gases. One barrel of gasoline was put into the tank on Saturday. The supply in the tank was practically exhausted (32). On the following Monday four barrels of gasoline were delivered and put into the tank. I did not then notice any odor of escaping vapor, except a slight odor of vapor when the gasoline was being drawn off. There is always some slight odor from it (33). Mixed with a certain proportion of air, I think, a destructive explosion of gasoline vapor might have taken place in the cellar if a match were lit down there. The piece of casting I was looking for was in a bin about twenty feet north from the back-cellar door. The bins were in the shelving which ran along the east wall, made by boards running up and down (34). After looking about with the first match along the tier of these bins I started a general hunt for the casting, but did not find it at all. Nothing occurred when I lit the first match, except that I looked and could not find the piece of casting (35). After I dropped the first match and lit a second all of a sudden the place was enveloped in a flame. It might have been a quarter of a minute or a half a minute. I had been looking with the second match for some time before the fire took place. The first thing I noticed was a bluish flame that filled the entire cel-

lar. "Seemed to move around in clouds—it was swishing." I did not notice it near where I was so much as I did in all the surrounding space (36). It came all at once. When I first noticed it, it filled the cellar. There was no fire in the furnace at the time, and had not been since the previous winter. It was a warm day and I was in my shirt sleeves (37). The tarred rope and excelsior were scattered about over the cellar floor, and we frequently dropped lighted matches on the floor. The first match did not go out in my hand. My recollection is that it became uncomfortable and I dropped it. I could not say whether or not it was aflame when it fell on the floor. I immediately struck another match (38). When I recovered consciousness I was protected by the broken cross-beams. Prior to lighting the second match I did not notice any kind of a fire in the back cellar. I might have noticed the fire had it been there, and at the same time I might not (39). I went out through the front wall. There had been a window there, but it was closed up and there was no opening through which light could come. I know Officer Bailey, of the Metropolitan police force. I probably spoke to him in reference to this occurrence. I did not tell him that I went down into the cellar and "lit a match, and that at the moment the match was lit an explosion occurred." That was not the case. I deny having told Officer Bailey or anybody else that such a thing happened; it was not the case. I do not remember having had a conversation with Mr. Bradley, the secretary of the insurance company, but may have had. I did not tell him that I lit a match, and that the moment the match was lighted "an explosion occurred," and that I knew nothing about it after that.

The bins where I was looking for the casting were on the east side of the front cellar. When I recovered consciousness I was lying flat on the floor of the cellar, but cannot say whether I was on my face or back. My clothing and ears and nose were full of mortar and dust (42).

The witness further testified, on direct examination, as follows:

The bins referred to in my previous testimony were made of two one-foot boards, laid flat and alongside of each other, extending the full length of the side of the cellar, and divided into bins by upright posts set at certain distances apart. They were all open and faced out into the cellar. They were made in the shelving to separate one lot of castings from another, and there was nothing in the nature of a box on the floor in which were stored the castings I was looking for (93).

Thereupon the plaintiff further gave evidence by one HENRY C. VOLKMAN, who testified, on direct examination, as follows:

In September, 1896, I was a sergeant of the Metropolitan police in charge of the Georgetown precinct. I went to Mitchell's place on the 28th of September, 1896, shortly after the fire occurred (44); arrived there, I saw the whole building demolished. I went around to the rear through the alley and up to the back of the demolished building. There I saw a little blaze oozing out quite near the back-

cellar steps and coming from underneath a pile of debris. I thereupon informed the police, and the fireman ran the hose up that way, but I was immediately called off to the front of the building.

On cross-examination the witness further testified as follows:

I saw only a smothering fire and a little blaze coming out from the debris.

And thereupon the plaintiff further gave evidence, testifying in his own behalf, as follows:

In September, 1896, I was engaged in the stove and tinware business, and had been engaged in that business in Georgetown since 1880 (47). The cellar door in front of my store was an old-fashioned sloping door, made of wood an inch or seven-eighths of an inch thick. This door was used as a sort of showcase for light goods. The front walls of the building were nine inches thick (48). I first knew the building in 1868. Its appearance indicated that it was very old at that time—possibly thirty-five years or more (49). We kept stoves in the store-room. On each side and down the center was a platform five feet wide, on which stoves were stored. Above that was a shelf three feet wide, on which smaller stoves were stored. Above that still another shelf, three feet wide, on which water coolers and ovens and things of that kind were placed. The platform began about four feet inside of the front door and extended to within five feet of the rear. I was not present when the accident occurred, and did not return for three-quarters of an hour afterwards (50). The building was then a wreck, with the fireman and policemen in charge. Oliver had been taken out. The customer on whom he was waiting was killed. We invariably used a candle or struck matches to find our way about in the cellar. This was a very frequent occurrence (51), depending on the season. I have been dealing in gasoline for ten or twelve years and know the odor, which is unmistakable. I also know that gasoline vapor burns very rapidly, because we have burned it in our place to show our customers, and have experimented with it with cans full or partially full, and found that the vapor coming from it burned very readily (52). The first policy I took out in the Potomac Insurance Company was in 1894, and for that purpose consulted with Mr. Bradley, the secretary of the company. Prior to that time I had a policy in the Franklin Company. When the policy
12 was handed to me my attention was not called to the clause with regard to the exemption of the company from liability on account of explosion (53). My attention was first called to it on the day of the explosion. When the debris was removed it was found that the joists were broken in the middle and hung upon the east wall, all of them, with the exception, perhaps, of two or three in front. The gasoline tank was in perfect condition as far as we could see. It still contained gasoline which was drawn out and sold to customers in the usual course of business after we had removed to another store. The tank machinery was intact. The rest of the stock was almost totally destroyed, with the exception of some few stoves and castings (55). Within a day or two after the

accident I called Mr. Bradley's attention to the matter, and received from him a letter, under date October 4th, wherein he states that the company declined to assume liability because of the collapse of my building (56). Replying to a subsequent letter, covering "proof of loss," Mr. Bradley says, "We disclaim all liability for loss caused by this explosion." I remember one complaint from Mr. Bender, on the east, of the smell of gas in their cellar. He was a baker. We sold twenty barrels of gasoline a month, and there was always more or less odor from it. The sales each day were numerous.

On cross-examination, in reply to questions propounded by the attorney for defendant, the witness further testified: The only complaint I ever had from Mr. Bender was about a month previous to the accident. He said there was an odor of coal oil in his basement. I went there and detected the odor of gasoline. Immediately I went into my own cellar to investigate and found no odor at all (59). I examined the tank frequently as well as it could be examined under ground, and the pipes leading from it, but detected no odors. I considered the building amply sufficient to support the stock of goods I had there. It had been used for similar business many years previously. I made a claim on the company for my loss. (The witness here identified the "proof of loss") (60). The loss to me was entirely due to the falling of the building and the crushing of my stock.

In response to a question propounded by the court, the witness further testified as follows: The main wall of the front and both sides of the main building were down when I arrived. The joists ran east and west across the building parallel with the front of it.

On redirect examination, the witness further testified:

I have frequently struck matches in the cellar, front and back, and so have my workmen. These matches they would drop on the floor, and sometimes lay them on a piece of firebrick or castings on the shelf. I have frequently seen burnt matches lying about. The building, on the west abutted on an alley. There was a brick house on the east.

On further cross-examination, the witness testified:

No one, to my knowledge, was down in the cellar on Sunday, and I could not say that any one had been down on Monday previous to one o'clock, when Mr. Oliver went.

13 And thereupon the plaintiff offered in evidence the deposition of WILLIAM P. HOWE, taken by consent of counsel, as follows:

I am now and for six years have been in charge of the nap-tha department of the Standard Oil Company. I have been in the petroleum business continuously for over twenty years and have a general knowledge of all its products. I have made a special and independent study of the nature and properties of the lighter products of crude petroleum (64). It is like water in color and more or less volatile according to its density. It is largely used all over the country for heating, lighting, domestic fuel, and numerous manufacturing purposes. It is usually kept in stock by

dealers in barrels, cans, and tanks of various kinds. The safest way to keep it is in iron tanks sunk in the ground. When so stored there is but little risk by fire from the gasoline itself. It generates vapor at all times (65). Exposure to currents of air increases the evaporation; artificial heat is not necessary. It is heavier than atmospheric air, and gradually works its way to the ground, running downward like water. It has a very pungent odor, which cannot be mistaken. If the layers of vapor be stirred by artificial means, such as an electric fan or light breeze, for instance, and the vapor comes in combination with air in the proportion of, say, 5 % of vapor to 95 % of air, it becomes an explosive mixture. A person could not go into a room so charged without detecting the odor.

Undisturbed, layers of vapor will lie along the floor with a level surface like water, and are then highly inflammable. The vapor burns rapidly with a bluish-yellow flame. A peculiarity of this vapor is that once in the open air it will sink to the lowest possible level in the absence of currents or draughts of air or other similar disturbing causes.

When gasoline is kept in an underground tank there is little or no danger from fire. Great care should be taken to prevent the escape of vapor. When kept in tanks, if the gasoline gets low, vapor will be generated and forced out when the tank is refilled.

Very little gasoline vapor would be needed to create an explosion if mingled with a large proportion of air. To make an explosion sufficient to create a great amount of damage, the vapor would have to be distributed generally throughout the cellar. Its presence under these circumstances would be detected by the odor. If undisturbed by currents of air or other similar causes, layers of vapor might accumulate on a cellar floor in quantities, if ignited, to produce a vacuum by quick combustion. This is the chief danger from the presence of vapor in a cellar. Gasoline vapor is ignited by a blaze or a spark and burns like a flash (67).

And thereupon the plaintiff further gave evidence by one CHARLES E. MUNROE, who testified, on direct examination, as follows:

I am professor of chemistry at Columbian university and have been in the practice of chemistry since the year 1871. I was pro-
fessor of chemistry at the United States Naval Academy from
14 1874 to 1876, and was chemist at the United States torpedo
station and war college from 1876 to 1882. In my lectures I have been teaching students regarding the properties of gasoline and other petroleum products and made repeated experiments therewith (68). It is a clear liquid, which gives off vapors having a characteristic odor. These vapors in contact with oxygen or air are highly combustible. Gasoline itself will not burn and will not explode and has no explosive properties outside of the vapor which it generates (69). It gives off vapor at all ordinary temperatures, even at the freezing point of water and more readily the higher the temperature and when exposed to drafts (70). Gasoline vapor is about three times as heavy as air and will fall through the air. It

flows like a liquid over the surface on which its is until it has reached the lowest point, like all other liquids, tending to assume a position of equilibrium. If the quantity of air mixed with it is considerable, it burns with a pale-blue flame. In the proportion of fifty per cent. of vapor to fifty per cent. of air, it is not explosive (71). So with two or three per cent. of vapor and ninety-seven or ninety-eight per cent. of air. Between five and twenty-five per cent. it is explosive or goes off with a vigorous puff. With ten per cent. of vapor and ninety per cent. of air we have a maximum violence. Five per cent. of vapor and ninety-five per cent. of air results in a vigorous puff on the ignition of the mixture. So when the percentage of vapor is as great as twenty-five per cent. Below five and above twenty-five per cent. the mixture burns with a constantly diminishing speed. It may be ignited by a flame or by electric sparks, but not by a common spark. It never ascends when undisturbed (72). A person igniting gasoline vapor with a match could not fail to be aware of the fact. Gasoline vapor dissipates when it is exposed unconfined to another atmosphere. The rapidity with which it dissipates depends upon circumstances. If it is constantly stirred up by persons walking through it or in any other way, it dissipates very rapidly (74).

Asked to define "explosion," the witness answered:

"An explosion is the result due to the conversion of a solid or liquid into a gas, or the expansion of a gas, which is accompanied with a loud report and the shattering of the material about it."

Asked to draw a distinction between "quick combustion" and "slow explosion," the witness answered:

"It is exceedingly difficult to draw a sharp line between any systems of classification."

One volume of gasoline will give off 140 volumes of gasoline vapor. There are 4,653 cubic feet in Mitchell's front cellar (76); 1,252 feet in the back cellar. To give three per cent. of vapor in the front cellar would take 7.4 gallons of liquid gasoline; a ten per cent. mixture, 24.7; a 25 % mixture, 61.7. To give a three per cent. mixture in the back cellar would require 1.9 gallons of liquid gasoline; 10 %, 6.4 gallons; 25 %, 15.9 gallons (77). If Mitchell's tank were empty of gasoline the volume of vapor it might contain, if forced out, would be 3.1 by volume of the cubic contents of the back cellar.

15 The ordinary pressure of the atmospheric air is 15 pounds to the square inch. This pressure upon an area equal to the surface of plaintiff's store floor would be 641 tons. The pressure upwards being the same, equilibrium results (79). At the rate of one pound per square inch the pressure on an area equal to Mitchell's store would be nearly 43 tons. The result of a rapid combustion of gasoline in the cellar would be an expansion of the atmosphere in the cellar, producing a pressure. On the completion of the combustion there would be a vacuum formed by the cooling of this expanded air and the product of the combustion. It would be greater or less in proportion to the consumption of the air and the expulsion of the air (80).

The witness, having stated that he had heard the testimony of the witness Oliver as well as he could catch it, said, when asked to express an opinion as to the cause of the prostration of plaintiff's building:

"From the testimony, as I heard it, I am of the opinion that the building was prostrated through the combustion of some body there or some substance there that burned rapidly, and that as a result of this rapid combustion, there being, according to Mr. Oliver's testimony, but a psh-ing sound in the burning by the increased pressure, the floor was raised to a slight extent, and then, by the condensation, there was a pressure brought to bear upon the upper surface of the floor, and then it gave way. That, from my observation and hearing his testimony, is the impression I have got and the opinion I hold" (81).

On cross-examination the witness further testified as follows:

Gasoline vapor is not regarded as a very explosive article by scientists, and it is not explosive except in proper proportions with the atmosphere. The gasoline itself is no more explosive than wood or any other substance. If the vapor comes out of a tank it must mix with the atmosphere as it comes out (82), and, as it mixes with the atmosphere in the proportions I have mentioned, the mixture is an explosive, and regarded as a very violent explosive, and I have so taught. Whether it is dangerous or not will depend upon the proportion of gasoline vapor in combination with air. An amount which is not dangerous can be detected by its odor. A proportion which is present in the atmosphere to such an extent as to create an explosion cannot be determined by its odor (83). It is considered dangerous to bring this gasoline, or the fumes of this gasoline, near a lighted match or fire of any kind. There are many records of explosions resulting from contact of fire with these vapors, and a good many times explosions have occurred from vapor from small bottles of benzine used in cleaning gloves, a match being lighted in the room.

On redirect examination the witness further testified:

Gasoline vapor, being three times heavier than air, soon seeks the lowest point, as water or any other liquid does. It flows down and stays there, forcing the atmosphere out. The heaviest vapor settles on the floor and stays there (84). It acts in all respects like water; it falls on the floor or earth and flows to the lowest point,
16 until it reaches a condition of equilibrium—a level surface. There it remains until stirred by mechanical means. When in combination with air in the proportion of from seven to nineteen per cent. of vapor it is as certain to explode as gunpowder, and the pressure approximates to that produced by gunpowder (85).

In response to questions by the court, the witness testified further:

As the percentage is increased the weight of the vapor is lessened and becomes nearer to the average of atmospheric air. The vapor of gasoline is entirely free of oxygen or air (87).

By the COURT:

Q. "You based your opinion, I believe, of the cause of the explosion largely upon the circumstance that Mr. Oliver stated he heard a swish?" A. "Largely that."

And thereupon counsel for the plaintiff offered to ask the witness the following hypothetical question:

"Assuming that an iron tank, capable of containing five barrels of gasoline, was sunk into the ground in the back cellar of the plaintiff's premises, as described by plaintiff's witnesses; that it was practically empty of liquid gasoline on a Saturday afternoon and remained empty until after 11 o'clock on the following Monday morning, and that then four barrels of liquid gasoline were poured into the tank, displacing any vapor that the tank might then have contained, and that subsequently, on or about one o'clock of the same Monday, a rapid combustion had taken place in the front or back cellar, unaccompanied by the report of an explosion, and that it was followed by the prostration of the front building of plaintiff's premises, what, in your opinion, was the cause of such prostration?"

To which question attorney for the defendant objected, and the court sustained the objection; to which ruling of the court the plaintiff, by his counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon the witness further testified upon cross examination as follows:

If there was lurking in one of the bins mentioned by the witness Oliver a ten per cent. mixture of gasoline vapor, the application of a match would have caused an explosion at that point. It would have extended beyond that point if the air in the room was permeated with less than ten per cent. of the vapor. The destructive forces connected with the explosion of a smaller quantity of the gasoline vapor would depend on the area exterior to it.

In response to a question propounded by the court, the witness further testified if there were two or three feet in depth upon the floor of the mixture of gasoline vapor and 10 % of atmospheric air and a lighted match or any flame were to come in contact with that and an explosion were to ensue, it would or might be an explosion of some magnitude (92).

And thereupon counsel for the plaintiff rested.

17 And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the defendant, to maintain the issues on its part joined, offered and gave evidence as follows:

By LOUISA BENDER, who testified, on direct examination, as follows:

In September, 1896, I lived with my husband at 3106 M street, where we kept a bakery. This was next door to Mr. Mitchell's place. We complained to him once about the smell of coal oil or some kind of gas in our cellar (95). We did not have coal oil or gasoline in our cellar. Mr. Mitchell told me he did not think the

smell came from his place, but a few days afterwards he said that he found it was so; that he had gone down into his cellar and found something leaking there. This was a month or two before the accident (96). I was not home at the time of the accident and did not come home for a half an hour afterwards; noticed this smell of gasoline a couple of days before the accident (97).

On cross-examination the witness testified as follows:

There was a wall between Mr. Mitchell's cellar and ours, which I could not see through nor talk through. It seemed tight. We found our way around in the cellar by the aid of a candle. There are gas pipes down there and a gas meter (98). The cellar was the only place where we smelled gas or vapor (99). He told me he had found a leak in his cellar and he attended to it. A couple of days before the accident we smelled it down in the cellar again.

And thereupon the defendant further gave evidence by one JOHN BENDER as follows:

In September, 1896, we kept a bakery at 3106 M street. We frequently noticed an odor of gas in the cellar, but did not know whether it was coal oil, gas, or gasoline vapor, so we sent for a practical plumber to examine into the matter (100). Sometimes the smell was there and sometimes it was gone. I do not remember about having noticed the odor at the time of the accident.

On cross-examination the witness further testified as follows:

I have lived at 3106 M street for the last ten years; was there before Mr. Mitchell came (102). I cannot remember when I first detected the odor of gasoline, because it was so often. I noticed it three years prior to the accident. I did not know it was gasoline. It smelled like gas or coal oil, similar to it. I thought it was gasoline because Mr. Mitchell lived next door (102). We once used a gasoline stove in the kitchen, upstairs, but this was before the explosion. I cannot say how long before. We bought gasoline from Mr. Mitchell. We stopped using it before Mitchell's house fell down. We gave up using gasoline because it is dangerous. Friends told us this and explosions over there were the proof of it (104). The wall between the Mitchell cellar and ours was about twelve inches thick, made of big stones and mortar.

18 And thereupon the defendant further gave evidence by one ANDREW J. SULLIVAN, who testified, on direct examination, as follows:

In September, 1896, I was foreman of No. 5 engine company (105). The building used by that company is on M street, near 32nd, just a little over a square from Mitchell's store. I was sitting in front of the engine-house, in a chair, when the accident occurred, and "I heard an explosion" and was startled. I looked down M street and saw a big cloud of dust. We pulled out and went directly to the place of accident, and I saw some men getting a man out of the entrance on the east side of Mitchell's place (106). I went down to the corner and did not see any fire or any indications of a fire. In the meantime men were crying that some people were buried in the

ruins. A little later I went down to the alley and in back of the house, but did not see any fire. There was a little smoke coming out of the cellar at the end wall of the back building. I went to the cellar and looked in and saw a can on a barrel, a pint cup, and there was a little blaze coming out of it, with something in it burning. That was all the fire there was (107). I stayed there until twelve o'clock overseeing the men who helped to dig out the man who was killed.

On cross-examination the witness further testified as follows:

When I arrived at the scene of the accident the front wall was crushed down, though a part of the wall was not down all of the way. It was down to the top of the front window, half way of the window (108), along the entire front. The bricks of the front wall were scattered on the pavement. The roof was on the sidewalk, the front part of it. The west wall of the building was not down. The timbers were all broken in the middle (109). The joists that supported the store floor were all broken in the middle. The noise I heard was an explosion, like a lot of powder confined—"boom!" It did not sound like tinware and stoves tumbling down, but like an explosion. It said "boom!" and made me start out of my chair. The little can which I saw on the barrel was in the back cellar (110). I saw the can on the barrel on the left-hand side of the cellar. We started out to the scene of the accident at 1.46.

And thereupon the defendant further gave evidence by one JOHN G. KURTZ, who testified, on direct examination, as follows:

I am 2nd assistant chief of the fire department. I was at the building the day of the accident; received notice at 1.46. I saw this little fire in the cellar and called a fireman to bring his stream and put the fire out (112). I saw about as much fire as I could put in my cap. I could not tell what it was that was burning.

On cross-examination the witness further testified as follows:

The little fire I saw was in the southwest corner of the main cellar, about ten feet from the west wall (113).

19 And thereupon the *witness* further gave evidence by one KATHERINE GOTTHARDT, who testified, on direct examination, as follows:

In September, 1896, I was working for Mr. Bender at 3106 M street (114). Just prior to the accident to Mitchell's store I noticed something that smelled like gasoline in our cellar; this was a couple of days before (115).

On cross-examination the witness further testified:

"I noticed this odor in the back part of the front cellar of our place. Mrs. Bender was not using gasoline at that time."

And thereupon the defendant further gave evidence by one SAMUEL ARTZ, who testified, on direct examination, as follows:

I am a registered plumber. My place of business is 3007 M street N. W. (116). Some time in September, 1896, I was asked by Mr. Bender to come and make an examination of his cellar in house

No. 3106 M street. As soon as I got into the cellar I noticed a smell of gasoline, with which I am familiar. I went over the meter and all over the pipes, and I noticed this smell worst near the west wall of the house (117).

On cross-examination the witness further testified:

The foundation wall between the Bender and the Mitchell buildings was made of stone laid in mortar. I did not light a match or candle, because I always go along the pipes and smell (118). I go by smell entirely, and I noticed the odor of gasoline as soon as I got in the cellar.

And thereupon the defendant further gave evidence by one JOHN W. BAILEY, who testified, on direct examination, as follows:

I am a policeman, and in September, 1896, was stationed at 32nd and M streets, in Georgetown, in the same block as Mitchell's store. I remember the accident (119). I was standing at the time in front of Mr. Manogue's door, on 32nd and M streets. The thing I heard was a boom that sounded like these sundown guns at a distance. I turned immediately and saw Mr. Mitchell's front wall fall out on the sidewalk. I know Mr. Joseph Oliver, who is an employé of Mr. Mitchell's. I had a talk with him in regard to the occurrence after he got well. "He said he struck a match when it made a sizz like that" (120).

On cross-examination the witness testified as follows:

The sundown gun I referred to is the gun at Fort Myer. It sounded like at a distance—smothered like—away in the distance. It was not a noise such as would be made by stoves and tin cans tumbling around, nothing of the kind. It was like a boom at a distance. I cannot explain it in any other way—a smothered noise.

And thereupon the defendant further gave evidence by one JOSEPH H. BRADLEY, who testified, on direct examination, as follows:

I was the secretary of the Potomac Insurance Company in September, 1896. The office of the company was at 1219 32nd street, a few doors north of M street (121). I was standing in the back part of our office near the window, which was open. What attracted my attention was that "I heard an explosion." I went to the entrance on 32nd street and saw a lot of persons running on M street towards 31st. I went down to the building and I found it entirely demolished, the front entirely on the street and the whole structure entirely down (122). I know Mr. Joseph Oliver. He was then employed by Mr. Mitchell as clerk. About a month after the occurrence I had a talk with him about it. He said he had gone down into the cellar to get a piece of casting for a customer; that it was dark and he lit a match to look for what he wanted, and the place blew up (123), and his face and hands were burned and his hair and eyebrows singed, and he was knocked down by this explosion. I do not know that he spoke of it as an explosion. He then said that he got up, and his first instinct was self-preservation; that he looked and saw a light in the front part

of the building, and some men assisted him out of the hole, an opening which was afterwards closed up.

The witness here identified the "Proof of loss" submitted by Mr. Mitchell, which was offered in evidence.

This proof of loss, sworn to by the plaintiff on the 9th day of November, 1896, after reciting the policy, claimed $2,500 as damages, and stated, in the handwriting of plaintiff's attorney—

"That the fire originated in the ignition on the basement floor of bits of paper or straw, followed by an explosion of gasoline gas, as is supposed. This deponent was not present at the time of the fire."

On cross-examination the witness further testified as follows:

The conversation with Mr. Oliver, which I have referred to, occurred in front of Mr. Mitchell's store, about a month after the accident. He said he struck a match and the thing blew up (124). He simply spoke of it as an explosion. He did not say "sizz." He said "blew up," and his face and hands were burned and his eyebrows singed. I cannot say that he used the word "explosion." My impression is that he did, but since his denials this morning I will not positively state whether or not he used the word "explosion." I cannot say.

And thereupon the plaintiff further gave evidence in rebuttal by JOSEPH A. OLIVER, who testified, on direct examination, as follows:

Mr. Bradley was in the main right (125) in his statement of the conversation that occurred between us, except that I did not see a light until I got near to the front of the building. What induced me to go towards the front was not that I saw a light there, but because I saw a fire in the rear, and I did not see this light in front until I nearly reached it. I don't know what I had to go through. I could not see anything. It was nearly thick with dust and mortar, and there was absolutely no light coming into the place. "If you can imagine absolute darkness, that was there."

21 And thereupon the plaintiff further gave evidence in rebuttal by himself, who testified, on direct examination, as follows:

The complaint from Mrs. Bender about the smell of gas was a long while preceding the trouble (126). She complained of a smell of coal oil in her cellar and wondered if it could come from our place. I knew that we had put gasoline into our tank a very little while before, and there were odors from it, and I thought possibly some of these odors might have gotten into her building. I never remember having noticed a leak in our gasoline tank or having had cause to look for a leak. I did notice odors in her cellar, which was entered by a back door similar to ours. This was a month or two before the accident (127).

And thereupon the plaintiff further gave evidence in rebuttal by JOSEPH FEARSON, who testified, on direct examination, as follows:

I am a brick contractor, and on the afternoon of the 28th of Sep-

tember, 1896, was driving along M street, going east, in front of and twenty-five feet from Mitchell's store (128). "I was driving along, and the first thing I knew there was a flash came out of what they call a cellar door here, and there was a lot of tin cans and things fell out into the street. * * * I looked around and saw the house all collapsed." The walls fell right in; the front wall covered half the pavement when I saw it. The noise I heard was "a rumbling noise—the building falling down."

On cross-examination, the witness further testified as follows:

I heard "just a rumbling noise—the building tumbling in" (129). When the flash came out of the cellar door, I think it flew open; I couldn't say.

In response to question of court, the witness said: "I said I saw a flash come out of the cellar door—the opening there—and a lot of tin cans and wash-boilers and things fell down in front of my horse. Q. Do you mean that the cellar door flew open? A. I think it did. I could not say."

And thereupon the plaintiff further gave evidence by one JOHN SULLIVAN, who testified, on direct examination, as follows:

Just prior to the accident I had been at a store almost immediately opposite Mitchell's place (131). I was on my way to Mitchell's, but had been detained in the other store for a few minutes. When I started across to Mitchell's I had to wait for the passing of a cable car. As the car passed I heard a noise something like a bad firecracker, and then "pfeu-feu," that blew out the wall (131). The report was just loud enough to hear a block away; something on that order. The first thing I heard was a "pfeu-pfeu."

And thereupon the plaintiff further gave evidence by one THOMAS GALLOWAY, who testified, on direct examination, as follows:

I am a builder, and have been engaged in that business here in this city since 1871 (132). On the day of the collapse of Mitchell's building I was driving east on M street and immediately in
22 front of the building when the accident happened. The noise which attracted my attention was such a noise as the rushing of large bodies of air through a small opening would make. "There was no report." Immediately after the concussion there was the noise of breaking glass, rattling tins, and, I think, the noise afterward of the dropping of the roof. The roof dropped eight or nine feet solid right on the second floor joists. There was no explosion at all; just merely a concussion like "shu-shu." I was stung a good deal in the face with the dust and pieces of glass, and my horse was cut in five different places and the front of my wagon was considerably littered with glass, putty, and stuff (133). This was right immediately. The stinging and the collapse of the building was right immediately. The stinging and the collapse of the building were instantaneous, so close together that I couldn't distinguish any difference (134).

And thereupon the witness further gave evidence by one DAVID F. WEAVER, who testified, on direct examination, as follows:

In September, 1896, I was in the shoe business (138) at 3123 M street, on the opposite side of the street from Mitchell's place. I was in the middle of my store that day. I heard the crash and ran to see what it was. It was a crash like a building falling—like stoves falling, and tinware and such stuff (139).

And thereupon the plaintiff further gave evidence by one JOHN S. BLACKFORD, who testified, on direct examination, as follows:

I am a watchmaker and jeweler at 3125 M street, and have been for more than fifteen years at that place. On the day of the accident to Mitchell's place I was in the rear part of my store at the time. "The doors were open and I heard a crash." I could hardly distinguish at the time what it was, but it was something that sounded unusual, and I ran to the front door, to find the street full of dust, so that I could not see across the street, and after a little subsidence of the dust I observed the destruction of Mitchell's place; the walls were down and the crowd was gathering. As to the character of the noise, it would be that of any ordinary noise of a falling wall—crashing—like the disturbance or breakage of windows and anything that could accumulate stuff that would fall together. The front wall was about half way down and the roof of the building resting on the wall in an inclined position. The front pavement was fairly clear—a few bricks here and there, but most of the debris had fallen into the center part of the building. The west wall had fallen partly over on the frame building west of it. I could not see anything of the wall, because the roof covered all of the upper parts of the building.

On cross-examination, the witness further testified as follows:

The west wall must have fallen down, because the roof was touching the ground (141). I did not go out to examine it carefully. I examined the ruins from my front store; did not go across (142). I was in the rear part of my front store when the crash came (144).

23 And thereupon the plaintiff rested, and the foregoing is all the testimony that was offered at the trial.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the plaintiff, by his counsel, requested the court to give the jury the following instructions, and each of them:

If the jury find from the evidence that on the 28th day of September, 1896, at or before the time the witness Oliver went into the cellar of the plaintiff's premises, as described by him, a fire originating in accidental or other causes was in progress in the back cellar of said premises, and that afterward and while such fire was in progress the gas or vapor generated by the evaporation of liquid gasoline came in contact with the flames of such fire and exploded and prostrated portions of the building in which the insured commodities were stored, then the damage done to such commodities by reason of such prostration was occasioned by fire within the

meaning of the policy, and the plaintiff is entitled to recover in this action.

(Refused.)

2. If the jury believe from the evidence that on the 28th day of September, 1896, the commodities of the plaintiff mentioned in the policy of insurance, offered in evidence, were destroyed or injured or lost in the manner testified to by the plaintiff's witnesses, and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured was the immediate result thereof, then the loss was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action.

(Granted.)

3. If the jury find from the evidence that the liability to explode with destructive force is one of the incidents of gasoline vapor under certain conditions, then the defendant company will be presumed to have contemplated such effects as fire might or would naturally produce on such vapor when it issued the policy of insurance sued on in this action, and if the jury further find from the evidence that the prostration of a portion of the building in which the insured articles were stored and the resulting damage to such articles were occasioned by an explosion of gasoline vapor having its origin in fire, the plaintiff is entitled to recover in this action.

(Refused.)

4. If the jury find for the plaintiff their verdict must be for a sum within the limit of the policy as would be equal to the amount of damage, as shown by the evidence, done to the insured commodities of the plaintiff by reason of the collapse of the building in which they were stored.

(Granted.)

5. If the jury find for the plaintiff they may, in their dis-
24 cretion, allow interest on the amount so found from a date to be determined by them, not earlier than January 19th, 1897.

(Granted.)

And thereupon the court gave said instructions numbered 2, 3, and 5, but refused to give the other two of said instructions, numbered 1 and 3, or either of them; to which refusal of the court in each instance the plaintiff, by his counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the court, at the instance and request of the defendant, gave the following instructions and each of them:

1. If the jury find from the evidence that the plaintiff had stored in the cellar of his premises gasoline or other oil or vapor, and that from a leaky condition of the receptacle in which such gasoline, oil,

or vapor was kept or from any other reason the said cellar had become permeated to a great or small degree with escaped or escaping vapors, and that a burning match in the hands of an employé of the plaintiff or dropped by said employé of plaintiff, being brought into contact with such escaped or escaping vapors, caused an explosion, and that the damage, if any, to the chattels of the plaintiff resulted solely from such explosion, they should render a verdict for the defendant.

2. The jury are instructed that a lighted match held in the hand of an employé of the plaintiff, from which an explosion is caused resulting from ignition of vapors from oil or gases, is not to be considered "fire" in the meaning of the policy sued upon.

3. If the jury find from the evidence that an explosion or ignition of explosive matter not caused by a preceding fire took place on the plaintiff's premises, and that the loss or damage, if any, to his merchandise was caused solely by said explosion or ignition of explosive matter, then the plaintiff is not entitled to recover.

4. If the jury find that there was in the cellar of the premises occupied by the plaintiff as a store gasoline or other vapor oil, and that an employé of the plaintiff going down in the said cellar ignited a match, and that in consequence of said ignition of said match, acting alone, an explosion occurred prostrating the building in which plaintiff kept his store, they cannot find for the plaintiff for such loss or damage as was occasioned to his goods by such explosion and falling of the building, and their verdict should be for the defendant.

To each of which instructions at the time it was requested and before it was given the plaintiff, by his counsel, objected, and upon the overruling of such objection and to the giving of each of said instructions the plaintiff, by his counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon the court, of its own motion, charged the jury as follows:

25 GENTLEMEN OF THE JURY: I will take but a little of your time before submitting this cause to you for your conclusion in the matter. I will only say so much as appears to me necessary to be said upon the law of the case.

As you understand, this is an action brought by the plaintiff against the defendant insurance company upon a policy of insurance. Without this policy, which is the contract between the parties, there would be no right of action on the part of the plaintiff against the defendant, nor would there be any liability on the part of the defendant to the plaintiff. This policy of insurance, which is the contract between the parties, has created whatever right exists in the plaintiff, and has limited the liability of the defendant to the plaintiff. The plaintiff has sued upon this contract and it is absolutely essential that the plaintiff shall show that the evidence has brought his claim within the terms and conditions of the policy. If he has not, then it matters not how much sympathy

you may entertain for Mr. Mitchell, the plaintiff in this action, who has suffered a loss from some causes, your verdict necessarily must be for the defendant. On the other hand, if the testimony has shown that the plaintiff's loss and damage was caused by fire within the terms, meaning, and proper construction of this policy, then the plaintiff has proven a cause of action against the defendant to which the defendant must respond, and he is entitled to your verdict for whatever loss the evidence shows that he has sustained.

Now, what is this contract? It is a policy of insurance against loss by fire. I suppose that there are very few, if any, of you gentlemen on the jury who do not know what a policy of insurance is and what it means. I doubt if any of you would be so careless as to take out a policy of insurance—of fire insurance—with any company without inquiry as to the terms of the policy and without reading the policy and determining for yourselves its terms. But if you were so careless and so forgetful of your own rights and responsibilities, it would not protect you, nor does it protect the plaintiff in this instance, if it be the fact that he did not read over the policy and did not understand those terms when he accepted it.

The only right, as I have said, that the plaintiff has against this company is a right that is created by this policy of insurance, and that right is limited by the terms and conditions that are embodied in it; and if under any of its terms or provisions the plaintiff is not entitled to recover damages from the defendant, he has not made out his case. You should consider this case just as you would consider a case between individuals. It matters not that the defendant is a body corporate. This insurance company is entitled to the same consideration from you as if the defendant were an individual, and you are to determine the facts in this case upon your oaths and do justice between these parties, no matter whether the defendant be an insurance company—a body corporate—or an individual.

Now, what does this policy mean? What does it amount to?

The plaintiff is "insured in the sum of five thousand dollars
26 on his stock of stoves and their findings, tins and tinware, tools of trade, and such other goods kept for sale in a first-class retail stove and tin store, situate number 3108 M street, Georgetown, D. C. Privilege granted to keep not more (word 'than' omitted) five barrels of gasoline or other oil or vapor."

(You hardly need be told, I think, as ordinary business men, that a privilege to keep something does not bring the privileged article within the articles insured by the policy. Suppose that clause read "privilege to keep not more than fifty pounds of gunpowder" on the premises, and the party insured was keeping a dry-goods store or a drug store, would it be contended by any sensible man that the gunpowder was an article insured by the policy? Clearly this privilege to keep was inserted to offset the forfeiture of the policy if the provision contained in this policy were violated without this privilege, and that provision is this:

"If gunpowder, phosphorus, nap-tha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the

premises, in quantities exceeding one barrel at any one time, without written consent of the company," the policy should be void.

So that if these five barrels of gasoline were kept upon those premises without the written consent of the company, the policy would have been absolutely forfeited and the plaintiff would not have been entitled to recover damages for loss if the whole stock had been destroyed by fire) (I). So it must be believed that the plaintiff, when he took his policy, fully understood what its terms and provisions were. That is the reason that he asked for, received, and paid for this privilege of keeping not more than five barrels of gasoline on the premises. I suppose that inasmuch as keeping such inflammable material upon the premises would naturally increase the risk of loss, the insurance company would require the payment of a larger premium than it would have required if such inflammable material were not kept on the premises.

Now, that is the policy, so far as it extends to the articles insured and the privilege of keeping this inflammable substance upon the premises. There is another provision, however, in the policy which limits the responsibility of the defendant and which the plaintiff must have known at the time he took out his policy and paid for it, and that is that "this company shall not be liable for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power, nor for loss caused by lightning or explosions of any kind unless fire ensues and then for the loss or damage by fire only." (So that if the loss that was occasioned to the plaintiff by this accident upon his premises at the time that has been testified to was occasioned by an explosion, and an explosion alone, the defendant is not responsible for it.) It is not contended that any fire followed the explosion, and that any portion of this stock in trade was injured by a subsequent fire, but it is claimed by the plaintiff that there existed a precedent fire, and that the explosion was an
27 incident of that precedent fire. (The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to fire; but if the explosion were not an incident to a precedent fire, but was the origin and the direct cause of the loss, then there was no destruction by fire, and the plaintiff is not entitled to recover anything from the defendant) (II).

The testimony shows that, from some cause, this building, in which the plaintiff carried on his business and in which his stock in trade was contained, suddenly collapsed and fell or the supporting walls were blown out, and that the stock was injured by being crushed and broken. The plaintiff says that — moving cause was not an explosion. The defendant contends that it was an explosion, and we have been enlightened by the testimony of eye-witnesses to the impressions that it made upon their minds at the time, some near and some more remote from the place of the occurrence, and also by the expert testimony of Dr. Munroe, who has testified to the results of his scientific observations upon the inflammability of gasoline

vapor and upon its explosive character, as it is affected by the addition of certain proportions of atmospheric air. We also have from Prof. Munroe a definition of what constitutes an explosion.

(Now, gentlemen of the jury, when the word "explosion" was used in this policy, the company, as ordinary men—at least its officers were ordinary men and not, I assume, scientific men—and the party insured, an ordinary man, are presumed to have understood the word "explosion" in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word. And, after all, the question here being explosion or non-explosion, is, what do you, as ordinary men, understand occurred at that time in the light of all the testimony? Was it an explosion in the ordinary and popular sense of that word, or was it a fire with a subsequent explosion or a subsequent collapse of the building as a sequence to the fire) (III)?

Courts are not called upon frequently to give definitions of such matters. I find that Chief Justice Alvey, of the court of appeals of Maryland, now chief justice of our Court of Appeals, in a case that has been cited by the defendant in his argument upon the legal questions involved in this case, says this as to what is an explosion:

"An explosion, produced by ignition, according to common understanding, may be accurately enough described, for practical purposes, as a sudden and rapid combustion, causing a violent expansion of the air, and producing a report more or less loud, according to the resistance offered. That it greatly varies in its degrees of violence and the effects produced are facts fully within the experience of every one."

The court says, whether an explosion, so called, was an explosion or not is a question for the jury. So far as the report from the explosion is concerned, you can draw upon your experience.

28 You know that some explosions produce a loud report and some do not produce a loud report. If you take a small quantity of gunpowder and confine it within a close, tight, and strong box, or enclosing wrapper, and explode that gunpowder the report probably would be loud, but if contained in a weaker wrapper or box, the report from the explosion would not be so loud.

So that, as a part of the definition of "explosion," it is not essential that you should find that there was a great report, for, as the Chief Justice well says, and as you well know, the report is a matter that is dependent upon the amount of resistance that the body is subjected to in its rapid combustion and expansion.

Now, was there an antecedent fire? It is not claimed, and could not be claimed successfully, that the match held in Mr. Oliver's hand was an antecedent fire. If he had held a lighted candle in his hand and the explosion or rapid combustion had followed the application of this candle to this vapor, that would not have been an antecedent fire. If that furnace about which testimony has been received had been in full blaze and that blaze had communicated itself to those gases, that would not have been an antecedent fire.

The court was asked to instruct you with reference to the theory that there was a precedent fire in the back room. The court felt obliged to refuse such an instruction, because there is no testimony in the case that would justify the jury in reaching the conclusion that before Mr. Oliver struck that match there existed a fire in the rear portion of that cellar. There is no testimony and no evidence of the fact.

Now, the question for you to determine in the light of all this testimony and your own knowledge and experience is this: Was the falling of this building and the injury to the stock in trade contained within it due to an explosion or not? If it was, and there was no antecedent fire, the verdict should be for the defendant. If you find in the case evidence that there was an antecedent fire which did not amount to an explosion, but which was simply rapid combustion which resulted in a collapse of the building and not in an explosion, then it is conceded that the plaintiff is entitled to recover such damages as you shall find that he sustained. If you find a verdict for the plaintiff, you ought to give him interest on the amount to which he is entitled from the 19th day of January, 1897. You may take the case, gentlemen.

To such portions of said charge as direct the jury that gasoline and other oil or vapor was not within the protection of the insurance, and that the privilege to keep said articles was "inserted to offset the forfeiture of the policy," such portions being inclosed in brackets (I), the plaintiff, by his counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And to such portions of said charge as direct the jury that the plaintiff is not entitled to recover in this action, in case they find that the damage to his goods was caused by an explosion, unless the explosion were incident to a preceding fire, such portions being inclosed in brackets (II), the plaintiff, by his counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

29

And to such portions of said charge as define the word "explosion" and limit its effect upon the rights of the plaintiff under the contract of insurance to the meaning given it by "ordinary men," such portions being inclosed in brackets (III), the plaintiff, by his counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

All the foregoing proceedings were had and all of the said exceptions taken and noted before the jury retired to consider of their verdict.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, and before the jury retired to consider of their verdict, the plaintiff, by his counsel, prayed the court to sign and seal this his bill of exceptions and make the same a part of the record, to have the same force and effect as to each and every of the exceptions taken by the plaintiff and noted by the court, as aforesaid, as if the same had been set forth in a separate bill of exceptions

signed and sealed by the justice presiding at the trial, and accordingly, before the jury retired to consider of their verdict, the justice presiding signs and seals this the said bill of exceptions, to have the same force and effect aforesaid, now for then, this 14th day of November, A. D. 1899.

A. C. BRADLEY, *Justice.* [SEAL.]

Memorandum.

November 20, 1899.—Appeal bond filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the above and foregoing pages, numbered from 1 to 56, inclusive, to be a true and correct transcript of the record (as prescribed by rule 5 of the Court of Appeals of the District of Columbia) in cause No. 41240, at law, wherein Milton C. Mitchell is plaintiff and The Potomac Insurance Company of Georgetown, D. C., a corporation, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, the 28th day of November, A. D. 1899.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 949. Milton C. Mitchell, appellant, *vs.* The Potomac Insurance Company of Georgetown, D. C., a corporation. Court of Appeals, District of Columbia. Filed Dec. 4, 1899. Robert Willett, clerk.

30 WEDNESDAY, *February 7th, A. D.* 1900.

MILTON C. MITCHELL, Appellant,
vs.
THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C., a Corporation. } No. 949.

The argument in the above-entitled cause was commenced by Mr. Sam'l Maddox, attorney for the appellant, and was continued by Mr. J. Holdsworth Gordon, attorney for the appellee, and was concluded by Mr. Sam'l Maddox, attorney for the appellant.

31 MILTON C. MITCHELL, Appellant,
vs.
THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C., a Corporation. } No. 949.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

This was an action upon a policy of fire insurance for the sum of $5,000, originally issued February 3, 1893, and renewed from year to year. Recited premium is $50.

The property insured is thus designated in writing on the face of the policy:

"On his stock of stoves and their findings, tins and tinware, tools of trade and such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C."

"Privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor."

The policy is in the usual form and contains the following printed provisions:

"Against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from the 3d day of February, 1893, at twelve o'clock noon, to the 3d day of February, 1894, at twelve o'clock noon; to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured, are received at the office of the company."

In finer print are the following conditions, amongst others:

"It being covenanted as conditions of this contract that this company * * * shall not be liable * * * for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only."

"Or, if gunpowder, phosphorus, nap-tha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time without written consent, or if the risk be increased by any means within the control * * * of the assured, this policy shall be void."

The damage to the insured stock occurred September 27, 1896. It amounted to $4,568.50, and, as plaintiff admitted, was due solely to the falling of the building and the crushing of the stock.

The renewal premium for the current year had been $72.50. The extra premium was charged for the gasoline privilege.

The defendant denied liability on the ground that the fall of the building and injury to the stock had been caused solely by explosion, and was therefore excepted from the policy.

The testimony of plaintiff's leading witness, Joseph A. Oliver, which describes the building and the origin of the loss, and upon which the case of plaintiff almost entirely depends is here given as it appears in the bill of exceptions.

"I am the book-keeper, clerk and general manager for Milton C.

Mitchell, and have been employed by him for over fifteen
32 years. During the year 1896 he conducted a business at 3108 M street in a two-story-and-attic brick structure. His stock consisted of stoves and tinware, and he did besides a general repairing business. In front of the building there was a cellar door three or four feet wide projecting into the street and built on an incline of eight or nine inches. The base of it was about two inches above the pavement. There were two swinging doors, made of ⅞-inch pine stuff. These doors were not used as an entrance to the cellar, but as a means of getting heavy goods into it down a skid-board. In the daytime the doors were used as a sort of display place for light tinware. There was no glass or light through these doors, and there was no other opening in the front part of the cellar through which light could get. The first floor was used as a store-room. The openings into this room consisted of a door about four feet wide and two old-fashioned bay windows, also about four feet wide. The store-room, which covered the entire first floor, was about seventeen feet on the inside. In this store-room we kept stoves and tinware and samples, besides smaller things. In the back part of the room space was set apart for an office. The store-room was about forty feet deep; then there was just back of the main store a small room, where other goods were stored and where was situated the pumping apparatus for the gasoline tank. This was in the back building. Still further back, on a line lower than the store floor, was our repair shop. There was a small opening between the front and back store, but no door. The gasoline tank was underneath the back-cellar floor. It was filled by siphoning the gasoline from barrels into a pipe which came through the floor of the back store. This pipe led from the store floor into the tank. Customers were supplied with gasoline from a pump which was also operated in the back store. On the second floor we had a large stock of vapor stoves and a quantity of castings and tinware that were piled throughout the rooms. In the third floor we had a still heavier line of goods—stove castings and brick and tinware as well. There were three or four 3 x 6 windows in the front wall of the second store. In the attic there were two dormer windows. The only way of getting into the cellar was down some steps from the outside in the rear of the front store. There were no gas jets in the cellar and no artificial lighting of any kind. When near the door we could see without the use of a match or candle or any other light, but seven or eight feet away it was necessary to have artificial light of some kind. In the front cellar we kept stove castings and brick and the surplus of stoves and ranges. Along the sides shelving was arranged, on which brick and castings were put. The heavy goods were unpacked in the cellar. They usually came in parcels, tied with tarred string, and when unpacked the strings were cut and left where cut. They were inflammable, and besides there was more or less rubbish, paper, and excelsior on the cellar floor. The house was heated by a furnace in the cellar, six feet back from the door. The furnace had an ash-box two or three inches above the cellar floor. We never had any trouble with the gasoline vapor

from the furnace or from matches or candles with which we used to light ourselves about. We frequently had half a dozen candles setting around on the floor when we had much work to do. Between the front and back cellar there was an opening, but no door. The back-cellar floor was fifteen or sixteen inches higher than the front-cellar floor. The opening between the cellars had a door-sill about four inches high, set in stone and mortar. The top of this sill was four inches higher than the level of the back-cellar floor. But for this opening there was a solid brick wall between the front and back cellar. The back cellar was used for like purposes as the front cellar, except that we never put stoves there. It was not lighted except by a small window out into the alley. Matches and candles were used in the back cellar as in the front. When the workmen found what they might be looking for, it was customary to drop these charred matches on the floor or put them on the stoves or castings. The Saturday preceding the fire the gasoline in the tank ran low. We ordered five barrels that afternoon, but only one was sent, which was put into the tank, after which we continued to sell gasoline during the rest of Saturday, which was our busy day. The gasoline tank was practically empty on the Monday following, when four barrels were siphoned into it after eleven o'clock. The tank held five barrels. It was made of galvanized sheet-iron, sunk five feet in the ground, and had an iron top. This was fifteen inches below the surface of the ground. It was covered with earth, and on top of that cement was placed. Mr. Mitchell dealt quite largely in gasoline. On Monday, the 28th of September, Mr. Lenz, a customer, called for a particular piece of casting. No one was in the store but myself and the casting called for was in the cellar. I went for it down the back-cellar steps. It was about one o'clock in the day. When I went down there was no odor of gasoline in the cellar. I know the odor, which is pungent, unmistakable and easily detected. The particular piece of casting that was wanted was in a tier of bins in the shelving on the east side of the main cellar and about fifteen feet from the back cellar. It was so far from the door that I could not see it without the use of a light. On reaching the tier I struck a match and looked in the particular place where we were accustomed to keep this kind of casting; but it was not there. As I had been away from the store for three weeks previous and did not know to what bin in the shelves they had been moved, I started looking from one to the other, beginning near the top. The first matched burned my fingers, and I dropped it and lit another, with which I continued my search down, when all of a sudden the place was enveloped or filled with this blue flame. It was a bluish color, and I knew at once that it was gasoline vapor that had ignited. I knew it at once because I remembered the appearance of it—had seen it before. 'Where it started I do not know; but the first I knew of it, it was all over the place and I was in the midst of it.' I don't know distinctly whether the blaze started at my hand or not. When I became conscious of the fact that there were flames there, it was all over the place;

not only where I was, but all over the cellar. I noticed
33 it first all over the cellar. There was no noise connected with it, except the sh-sh-sh like the swish of a whip or anything of that kind. I could see it play around. I became unconscious, either from the burns or the walls falling on me, I don't know which. 'The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and, knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. I crawled towards the front, where I was pulled through the front wall.' I had been protected from the debris by the way in which the joists fell. They broke in the middle, one end remaining in the east wall and the other resting on the floor, thus leaving a little angle at the side. This condition existed all the way to the front of the building. It was very dark—like the darkness of Egypt. The brick-work was shattered in front and the house had fallen down. I was very badly burned, and did not get back to the store for three weeks. The debris had then been taken out and the place cleared up. The back-cellar door was always left open in the daytime, and it was the only means of lighting the front cellar. I have experimented with gasoline vapor in a simple way to show customers that when gasoline is confined in a tank or closed vessel it is perfectly safe. These experiments showed that it is impossible to ignite gasoline so enclosed. The vapor escaping through an opening in the vessel in which gasoline is confined could be lighted, but the flame could not be forced down to the gasoline itself. The vapor burned on the surface with a small blue flame appearing just where the vapor escaped from the can. A matted wire that will hold the fluid can be put down through the burning vapor into the can and brought back all aflame. If again inserted in the can you can hear it sizz as it goes down when passing below the surface of the opening. I have frequently taken a five-gallon can and set the vapor afire at the spout and poured the gasoline through the flame into a basin; the vapor would continue to burn at the spout, and the stream of gasoline, as it passed into the basin, would be afire, but you could put the gasoline back into the can, put the cap on the spout, and all the fire would go out. A gasoline stove could be ignited at the filler opening and gasoline might flow over the stove and take fire, but no damage would be done. The color of the flame of burning gasoline vapor is blue, and the kind of flame I saw in the cellar the day the fire or accident occurred. I did not notice any fire in the back cellar as I went into the front cellar the day of the accident. I was going in the direction opposite to the back cellar. The joists separating the store floor were very old and a condition of dry rot existed in most of them. It was a frequent occurrence for Mr. Mitchell, myself, and other employés to light matches and candles in the cellar. This was more frequent in busy seasons of our work than at other times in the year, and September is one of our busiest months. In the summer time some one or other of us went into the cellar possibly once an hour; in busy seasons, as often as once in fifteen minutes on an average.

After the accident the gasoline tank was in good condition.

The pumping machinery connected with the gasoline tank was in the rear store-room, being three feet from the door, which was always open during the day in the summer time. We had complaints once from our neighbors that they smelled gas. To my knowledge, the neighbors on the east did not complain of the smell of gasoline in their cellars.

On cross-examination the witness testified as follows:

The occurrence took place on Monday afternoon about one o'clock, and I had returned to work on the Saturday morning previous. I did not notice that day any odor of escaping gases. One barrel of gasoline was put into the tank on Saturday. The supply in the tank was practically exhausted. On the following Monday four barrels of gasoline were delivered and put into the tank. I did not then notice any odor of escaping vapor, except a slight odor of vapor when the gasoline was being drawn off. There is always some slight odor from it. Mixed with a certain proportion of air, I think, a destructive explosion of gasoline vapor might have taken place in the cellar if a match were lit down there. The piece of casting I was looking for was in a bin about twenty feet north from the back-cellar door. The bins were in the shelving which ran along the east wall, made by boards running up and down. After looking about with the first match along the tier of these bins I started a general hunt for the casting, but did not find it at all. Nothing occurred when I lit the first match, except that I looked and could not find the piece of casting. After I dropped the first match and lit a second all of a sudden the place was enveloped in a flame. It might have been a quarter of a minute or a half a minute. I had been looking with the second match for some time before the fire took place. The first thing I noticed was a bluish flame that filled the entire cellar. 'Seemed to move around in clouds—it was swishing.' I did not notice it near where I was so much as I did in all the surrounding space. It came all at once. When I first noticed it, it filled the cellar. There was no fire in the furnace at the time, and had not been since the previous winter. It was a warm day and I was in my shirt sleeves. The tarred rope and excelsior were scattered about over the cellar floor, and we frequently dropped lighted matches on the floor. The first match did not go out in my hand. My recollection is that it became uncomfortable and I dropped it. I could not say whether or not it was aflame when it fell on the floor. I immediately struck another match. When I recovered consciousness I was protected by the broken cross-beams. Prior to lighting the second match I did not notice any kind of a fire in the back cellar. I might have noticed the fire had it been there, and at the same time I might not."

The following evidence was introduced by the plaintiff concerning the nature and quality of gasoline. William P. Howe testified:

"I am now and for six years have been in charge of the nap-tha department of the Standard Oil Company. I have been in the petroleum business continuously for over twenty years and have a

general knowledge of all its products. I have made a special
34 and independent study of the nature and properties of the lighter products of crude petroleum. It is like water in color and more or less volatile according to its density. It is largely used all over the country for heating, lighting, domestic fuel, and numerous manufacturing purposes. It is usually kept in stock by dealers in barrels, cans, and tanks of various kinds. The safest way to keep it is in iron tanks sunk in the ground. When so stored there is but little risk by fire from the gasoline itself. It generates vapor at all times. Exposure to currents of air increases the evaporation; artificial heat is not necessary. It is heavier than atmospheric air, and gradually works its way to the ground, running downward like water. It has a very pungent odor, which cannot be mistaken. If the layers of vapor be stirred by artificial means, such as an electric fan or light breeze, for instance, and the vapor comes in combination with air in the proportion of, say, 5 per cent. of vapor to 95 per cent. of air, it becomes an explosive mixture. A person could not go into a room so charged without detecting the odor.

Undisturbed, layers of vapor will lie along the floor with a level surface like water, and are then highly inflammable. The vapor burns rapidly with a bluish-yellow flame. A peculiarity of this vapor is that once in the open air it will sink to the lowest possible level in the absence of currents or draughts of air or other similar disturbing causes.

When gasoline is kept in an underground tank there is little or no danger from fire. Great care should be taken to prevent the escape of vapor. When kept in tanks, if the gasoline gets low, vapor will be generated and forced out when the tank is refilled.

Very little gasoline vapor would be needed to create an explosion if mingled with a large proportion of air. To make an explosion sufficient to create a great amount of damage, the vapor would have to be distributed generally throughout the cellar. Its presence under these circumstances would be detected by the odor. If undisturbed by currents of air or other similar causes, layers of vapor might accumulate on a cellar floor in quantities, if ignited, to produce a vacuum by quick combustion. This is the chief danger from the presence of vapor in a cellar. Gasoline vapor is ignited by a blaze or a spark and burns like a flash."

Charles E. Munroe, testified, on direct examination, as follows:

"I am professor of chemistry at Columbian university and have been in the practice of chemistry since the year 1871. I was professor of chemistry at the United States Naval Academy from 1874 to 1876, and was chemist at the United States torpedo station and war college from 1876 to 1882. In my lectures I have been teaching students regarding the properties of gasoline and other petroleum products and made repeated experiments therewith. It is a clear liquid, which gives off vapors having a characteristic odor. These vapors in contact with oxygen or air are highly combustible. Gasoline itself will not burn and will not explode and has no explosive properties outside of the vapor which it generates. It gives off

vapor at all ordinary temperatures, even at the freezing point of water and more readily the higher the temperature and when exposed to draughts. Gasoline vapor is about three times as heavy as air and will fall through the air. It flows like a liquid over the surface on which it is until it has reached the lowest point, like all other liquids, tending to assume a position of equilibrium. If the quantity of air mixed with it is considerable, it burns with a pale-blue flame. In the proportion of 50 per cent. of vapor to 50 per cent. of air, it is not explosive. So with two or three per cent. of vapor and 97 or 98 per cent. of air. Between 5 and 25 per cent. it is explosive or goes off with a vigorous puff. With 10 per cent. of vapor and 90 per cent. of air we have a maximum violence. Five per cent. of vapor and 95 per cent. of air results in a vigorous puff on the ignition of the mixture. So, when the percentage of vapor is as great as 25 per cent. Below 5 and above 25 per cent. the mixture burns with a constantly diminishing speed. It may be ignited by a flame or by electric sparks, but not by a common spark. It never ascends when undisturbed. A person igniting gasoline vapor with a match could not fail to be aware of the fact. Gasoline vapor dissipates when it is exposed unconfined to another atmosphere. The rapidity with which it dissipates depends upon circumstances. If it is constantly stirred up by persons walking through it or in any other way, it dissipates very rapidly.

Asked to define 'explosion,' the witness answered:

'An explosion is the result due to the conversion of a solid or liquid into a gas, or the expansion of a gas, which is accompanied with a loud report and the shattering of the material about it.'

Asked to draw a distinction between 'quick combustion' and 'slow explosion,' the witness answered:

'It is exceedingly difficult to draw a sharp line between any systems of classification.'

One volume of gasoline will give off 140 volumes of gasoline vapor. There are 4,653 cubic feet in Mitchell's front cellar; 1,252 feet in the back cellar. To give 3 per cent. of vapor in the front cellar would take 7.4 gallons of liquid gasoline; a 10 per cent. mixture, 24.7; a 25 per cent. mixture, 61.7. To give a 3 per cent. mixture in the back cellar would require 1.9 gallons of liquid gasoline; 10 per cent., 6.4 gallons; 25 per cent., 15.9 gallons. If Mitchell's tank were empty of gasoline the volume of vapor it might contain, if forced out, would be 3.1 by volume of the cubic contents of the back cellar.

The ordinary pressure of the atmospheric air is 15 pounds to the square inch. This pressure upon an area equal to the surface of plaintiff's store floor would be 641 tons. The pressure upwards being the same, equilibrium results. At the rate of one pound per square inch the pressure on an area equal to Mitchell's store would be nearly 43 tons. The result of a rapid combustion of gasoline in the cellar would be an expansion of the atmosphere in the cellar, producing a pressure. On the completion of the combustion there would be a vacuum formed by the cooling of this expanded air and

the product of the combustion. It would be greater or less in
35 proportion to the consumption of the air and the expulsion of the air. The witness, having stated that he had heard the testimony of the witness Oliver as well as he could catch it, said, when asked to express an opinion as to the cause of the prostration of plaintiff's building:

'From the testimony, as I heard it, I am of the opinion that the building was prostrated through the combustion of some body there or some substance there that burned rapidly, and that as a result of this rapid combustion, there being, according to Mr. Oliver's testimony, but a p-shing sound in the burning by the increased pressure, the floor was raised to a slight extent, and then, by the condensation, there was a pressure brought to bear upon the upper surface of the floor, and then it gave way. That, from my observation and hearing his testimony, is the impression I have got and the opinion I hold.'

On cross-examination the witness further testified as follows:

Gasoline vapor is not regarded as a very explosive article by scientists, and it is not explosive except in proper proportions with the atmosphere. The gasoline itself is no more explosive than wood or any other substance. If the vapor comes out of a tank it must mix with the atmosphere as it comes out, and, as it mixes with the atmosphere in the proportions I have mentioned, the mixture is an explosive, and regarded as a very violent explosive, and I have so taught. Whether it is dangerous or not will depend upon the proportion of gasoline vapor in combination with air. An amount which is not dangerous can be detected by its odor. A proportion which is present in the atmosphere to such an extent as to create an explosion cannot be determined by its odor. It is considered dangerous to bring this gasoline, or the fumes of this gasoline, near a lighted match or fire of any kind. There are many records of explosions resulting from contact of fire with these vapors, and a good many times explosions have occurred from vapor from small bottles of benzine used in cleaning gloves, a match being lighted in the room.

On redirect examination the witness further testified:

Gasoline vapor, being three times heavier than air, soon seeks the lowest point, as water or any other liquid does. It flows down and stays there, forcing the atmosphere out. The heaviest vapor settles on the floor and stays there. It acts in all respects like water; it falls on the floor or earth and flows to the lowest point, until it reaches a condition of equilibrium—a level surface. There it remains until stirred by mechanical means. When in combination with air in the proportion of from 7 to 19 per cent. of vapor it is as certain to explode as gunpowder, and the pressure approximates to that produced by gunpowder."

In response to questions by the court, the witness testified further:

"As the percentage is increased the weight of the vapor is lessened and becomes nearer to the average of atmospheric air. The vapor of gasoline is entirely free of oxygen or air."

By the COURT:

Q. "You based your opinion, I believe, of the cause of the explosion largely upon the circumstance that Mr. Oliver stated he heard a swish?"

A. "Largely that."

A witness, who was a policeman at the time, saw "a little blaze oozing out quite near the back-cellar steps and coming from underneath a pile of debris."

The defendant offered in evidence the written proof of loss that had been submitted by plaintiff November 9, 1896, claiming $2,500 damages, and read the following clause:

"That the fire originated in the ignition on the basement floor of bits of paper or straw, followed by an explosion of gasoline gas, as is supposed."

Other evidence was offered by the defendant, tending to show that the owner of the adjacent house had detected the odor of gasoline vapor in his cellar at times before the accident and had called plaintiff's attention to it. That several persons within a block or two heard something like the "boom" of an explosion; one of them likening it to the sound of the sunset gun at Fort Myer. That a fireman who arrived early upon the scene saw a little smoke coming out of the cellar of the back building, looked in and saw "a can on a barrel, a pint cup, and there was a little blaze coming out of it with something in it burning; that was all the fire there was."

In rebuttal, five witnesses for the plaintiff testified to being in the street near by and hearing the sound of the falling walls and crashing stoves and tinware, unpreceded by the loud boom heretofore referred to. One of these said: "I heard just a rumbling noise—the building tumbling in. When the flash came out of the cellar door, I think it flew open."

Another said: "As the car passed I heard a noise, something like a bad firecracker, and then 'pfeu-pfeu,' that blew out the wall. The report was just loud enough to hear a block away; something on that order. The first thing I heard was a 'pfeu-pfeu.'"

A third said: "The noise which attracted my attention was such a noise as the rushing of large bodies of air through a small opening would make. There was no report. Immediately after the concussion there was the noise of breaking glass, rattling tins, and I think the noise afterwards of the dropping of the roof. There was no explosion at all; just merely a concussion like 'shu-shu.'"

The case was submitted to the jury upon the foregoing evidence, and resulted in a verdict for the defendant.

1. The first assignment of error is founded on the refusal of the court to give the following instruction to the jury:

If the jury find from the evidence that on the 28th day of September, 1896, at or before the time the witness Oliver went into the cellar of the plaintiff's premises, as described by him, a fire originating in accidental or other causes was in progress in the back cellar of said premises, and that afterward and while such fire was in progress the gas or vapor generated by the evaporation of liquid

gasoline came in contact with the flames of such fire and exploded and prostrated portions of the building in which the insured commodities were stored, then the damage done to such commodities by reason of such prostration was occasioned by fire within
36 the meaning of the policy, and the plaintiff is entitled to recover in this action.

The evidence on behalf of the plaintiff has been fully recited in the preliminary statements. In addition to this there was some evidence of the defendant showing the issue of smoke from the rear of the building and the existence of a very small flame in the rear cellar after the explosion, and on which appellant also relies. It is unnecessary, therefore, to review the testimony. The instruction undertook to direct the special attention of the jury, first, to the probable existence of an accidental fire in the rear cellar before the entry of the witness, Oliver, into the front one, and second, to the probable ignition of the vapor in the front cellar by that fire instead of by the match lighted by Oliver immediately before the explosion which took place in the front cellar. Neither of these inferences seem to have any reasonable foundation in the evidence, and the second is directly opposed to the testimony of Oliver, upon which the plaintiff's case rests. Had this been the only issue in the case, the court might, without error, have directed a verdict for the defendant. Gunther *v.* Liverpool, etc., Ins. Co., 134 U. S., 110, 116.

The plaintiff's right to have the general issue submitted to the jury, whether the explosion was directly caused by the lighting of the match by Oliver, or by accidental fire of any kind existing before, or proceeding indirectly from, the lighting of the match, is not involved in this record. The court gave the second instruction prayed by the plaintiff to the effect, that, if the "loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the insured was the immediate result thereof, then the loss was occasioned by fire within the meaning of the policy."

This was supplemented in the general charge as follows:

"It is not contended that any fire followed the explosion, and that any portion of this stock in trade was injured by a subsequent fire, but it is claimed by the plaintiff that there existed a precedent fire, and that the explosion was an incident of that precedent fire. The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to fire."

We must hold that this assignment of error is not well taken.

2. The second and third assignments of error are dependent upon each other, to a great extent, and can be more conveniently considered together.

After reading the description of the articles insured, as written in the policy, with the accompanying words: "Privilege granted to keep not more than five barrels of gasoline or other oil or vapor;" and the printed clause prohibiting the keeping of such oils "in quantities exceeding one barrel at any one time, without the written consent of the company," the court said to the jury: "Clearly this privilege to keep (five barrels) was inserted to offset the forfeiture of the policy if the provision contained in this policy were violated without this privilege."

The court added, also, that if these five barrels of gasoline had been kept upon the premises without consent in writing, the policy would have been forfeited; and, further, that the plaintiff understood the terms of his policy when received, and for that reason, asked, obtained and paid for the privilege.

The third assignment is on the refusal of the court to give the plaintiff's third prayer, as follows:

"3. If the jury find from the evidence that the liability to explode with destructive force is one of the incidents of gasoline vapor under certain conditions, then the defendant company will be presumed to have contemplated such effects as fire might or would naturally produce on such vapor when it issued the policy of insurance sued on in this action, and if the jury further find from the evidence that the prostration of a portion of the building in which the insured articles were stored and the resulting damage to such articles were occasioned by an explosion of gasoline vapor having its origin in fire, the plaintiff is entitled to recover in this action."

Appellant maintains two propositions under these assignments: First. "Gasoline was part and parcel of the appellant's stock in trade and was, and was intended to be, protected by the insurance." Second. "If the liability to explode with destructive force is one of the incidents of gasoline vapor when ignited, the appellee company must be presumed to have contemplated such effects as fire might naturally produce on such vapor when it issued the policy sued on."

(1.) Before considering the argument and authorities relied on to support these propositions, a preliminary contention of the appellant may be conceded as a correct statement of an abstract proposition; namely, that doubts about the meaning of the terms of a policy of insurance are to be resolved in favor of the assured.

This does not mean, however, that contracts of insurance shall not, like all other contracts, receive a reasonable interpretation consonant with the apparent object and intent of the parties thereto. Courts should be no more astute to find ambiguities in contracts of insurance than in other contracts. True it is, that they contain elaborate conditions, often in fine print, and sometimes of no application to the particular insurance effected, because of the adaptation of one standard blank form to widely distributed risks; yet, one who accepts a policy, like one who accepts a conveyance or executes a mortgage, under no circumstances of mistake or imposition, must be presumed to have read the instrument and agreed to its terms.

Whenever those terms and stipulations are ambiguous, whether by the addition of written words or not, and are susceptible of two meanings about which reasonably intelligent men can hon-
37 estly differ, then, undoubtedly, the construction most favorable to the assured must be adopted. Dumas *v.* Insurance Co., 12 App. D. C., 245, 255, 256; Imp. Fire Ins. Co. *v.* Coos Co., 151 U. S., 452, 463.

(2.) The proposition that gasoline was part of the insured stock and itself protected by the policy, is of practical importance only as a foundation for the next proposition.

This is, that, being so insured and its liability to explode with destructive violence, through ignition of its vapor, being well known, the insurer must be presumed to have contemplated this possible result and to have embraced it within the assumed risk.

The contention is, that a conflict is raised between the written part of the policy, describing the property insured, and the forfeiture clause relating to the keeping of explosive oils, wherefore the latter must give way.

Gasoline is not specifically named, but the claim is that it is included in the description, because it is an article usually "kept for sale in a first-class retail stove and tin store situated in Georgetown, D. C."

It would probably be a sufficient answer to say, that there was no direct evidence offered to show that gasoline was usually kept for sale in such stores. The court cannot take notice of the existence of such custom or usage, or supply proof by construction. Georgia Home Ins. Co. *v.* Jacobs, 56 Tex., 366.

Assuming that there may be ground, under all the circumstances of the case, for inferring that gasoline was by custom and usage, an article ordinarily kept for sale in such stores, there is much authority in support of appellant's contention. Phœnix Ins. Co. *v.* Taylor, 5 Minn., 492; Pindar *v.* Kings Co. Ins. Co., 36 N. Y., 648; Moscatt *v.* Granite State Ins. Co., 68 Vt., 253; Viele *v.* Germania Insurance Co., 26 Iowa, 1, 66; Lancaster Silver Plate Co. *v.* Insurance Co., 170 Pa. St., 151, 163; Harper *v.* Albany Insurance Co., 17 N. Y., 194; Harper *v.* N. Y. Ins. Co., 22 N. Y., 441; Archer *v.* Ins. Co., 43 Mo., 434; Maril *v.* Conn. Ins. Co., 95 Ga., 604; Yock *v.* Home Mut. Ins. Co., 111 Cal., 503; Foust *v.* Am. Fire Ins. Co., 91 Wis., 158, 162; Hall *v.* Ins. Co., 58 N. Y., 292.

It is proper to add, however, that in each of the foregoing cases, except the three first named, the situation was exceptional.

The question arose, either where there was insurance upon the materials of a trade or where permission had been given to carry on a trade or manufacture as, for example, that of bookbinder, printer, photographer, metal plater, painter and the like. Proof was permitted to show that some of the extra-hazardous or forbidden articles of a succeeding printed clause, were commonly, and had for a long time been generally, used in successfully carrying on such trade or manufacture.

In view of that proof the conclusion was, that the insurer, knowing those facts, must also be presumed to have contemplated the

carrying on of those trades and manufactures in the usual and ordinary manner, and with those articles and materials without which their operation must have been suspended or seriously impaired; and, hence, that the written clause, with this meaning, must necessarily override or qualify the conflicting printed condition of forfeiture.

The doctrine of some of the foregoing cases, to the effect that an insurance of goods usually kept in a general retail or country store, will cover, or permit the keeping of gunpowder and other explosives in reasonable quantities, notwithstanding the succeeding printed prohibitory clause, is opposed to some well-considered decisions. Birmingham Fire Ins. Co. *v.* Krogher, 83 Pa. St., 64; Western Assurance Co. *v.* Rector, 85 Ky., 294; Beer *v.* Ins. Co., 39 Ohio St., 109.

As was said in the last of those cases, their doctrine is not necessarily inconsistent with the doctrine of those relating to insurance upon trades and manufactures, or permitting the same, as including their usual materials and accessories.

In one class of cases, the trades insured, or permitted in connection with the things insured, could not reasonably be carried on without the constant use of certain hazardous accessories. In the other, carrying for sale a specially hazardous article in a stock of general merchandise would have no reasonably material relation to the other articles and to the general prosecution of the business. In fact, as suggested in one of the cases last cited, the reason for the prohibition may arise from the fact that the custom of selling powder does exist in a general country store; for if those articles were not frequently carried in such stocks there would be no need for the prohibition.

The point has been settled for our guidance, however, by the Supreme Court of the United States. Steinbach *v.* Insurance Co., 13 Wall., 183. That decision, though accompanied by a very brief opinion, is directly in point, and we do not find that it has ever been questioned by the same tribunal.

The single question decided was, that evidence was inadmissible on the part of the plaintiff to show that fireworks were included in the description of the insured goods, concluding with "other articles in his line of business," in the face of a printed condition requiring that written permission to keep fireworks must be procured.

(3.) For another reason, the case at bar could not be governed by the rule asserted by the appellant, even were there no question of the general recognition of its soundness. It differs materially from the cases supporting that rule in this: that, in connection with the written description of the property insured, appears the written consent of the insurer "to keep not more than five barrels of gasoline, or other oil or vapor."

This privilege, given in writing in strict accord with the condition of the printed forfeiture clause, shows conclusively that the plaintiff was informed of that clause, and believed that his policy would become void if he should keep more than one barrel of gaso-

line in his storehouse. Desiring to keep more than one barrel, and not more than five, he asked for the privilege, paid for it, and had it entered in writing in the body of the policy. The court was right, therefore, in telling the jury that this privilege had been inserted to avoid the forfeiture that would otherwise arise through violation of the prohibitory clause.

38 (4.) The prohibitory clause of the policy shows, as a matter of course, that the insurer apprehended the danger of keeping gasoline upon the premises. And it may therefore be presumed, as contended by the appellant, that it well knew the particularly dangerous property of that fluid to be its emission of vapor, that is highly explosive under certain conditions. It is plain, also, from the terms of the policy, that the insurer became liable for the resulting damage of a possible explosion caused by a precedent fire, as well as for all damage by fire ensuing an explosion from any cause.

Both of these extra risks were greatly increased by the additional quantity of gasoline permitted to be kept in the stock, and for these increased risks the insurer required and received an extra premium. But it does not follow that it assumed each and every risk of damage as a result of possible explosion. Whatever might be the established rule of liability in such cases for all damages by explosion, whether caused by precedent fire, or by fire ensuing, in the absence of further stipulation relating thereto, it has no application to this case.

The policy in this case does not admit of that question. It contains a further express condition that the insured shall not be liable for loss "caused by lightning, *or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only.*"

What has heretofore been said respecting the continued force and obligation of the special prohibitory clause, is applicable in general to the foregoing. The condition is plain, and is involved in no ambiguity through the terms of the written description or the privilege written therewith. Taken in connection with these, and the prohibitory clause with which it accords, it appears, that the insurer apprehended increased risks from the explosive property of gasoline, and that for a superadded premium it assumed two of these additional risks, namely, that of damage by fire increased by incident explosion, and that of loss and damage by fire ensuing an explosion that may have resulted from any cause whatever. The remaining risk, namely, that of loss or damage by explosion of any kind, not resulting from an ensuing fire, was cast, or left to rest, upon the insured.

The plaintiff's third prayer for instruction, being opposed to this view, was rightly refused.

3. The fourth assignment of error is on exceptions taken to four special instructions given by the court at the request of the defendant.

The substantial effect of these instructions may be thus stated: (1.) If the loss was caused solely by an explosion or ignition of

explosive matter, not caused by a preceding fire, the plaintiff cannot recover.

(2.) If an explosion occurred from contact of escaping vapor with a match lighted and held by an employee of the plaintiff, and the loss resulted solely from such explosion, the verdict must be for the defendant.

(3.) A match lighted and held by an employee of the plaintiff, coming in contact with the vapor and causing an explosion is not to be considered as "fire" within the meaning of the policy.

A glance at the testimony set forth in the preliminary statement shows that these propositions have direct application thereto. That there was no error in embodying the two first in specific instructions to the jury, follows from what has been said touching the refusal of the plaintiff's third special instruction, under the preceding assignment. Nothing more needs to be added.

The last instruction, to the effect that loss proceeding solely from an explosion caused immediately by the contact of a lighted match, in the hands of plaintiff's employee, with the escaped gasoline vapor, was not a loss by "fire" within the meaning of the policy, states a sound proposition of law as applied to the terms and conditions of the policy under consideration. This conclusion is not only in accordance with what seems to be the plain and reasonable meaning of the whole contract of insurance as embodied in the policy, but has also the support of a number of well-considered decisions. United Life, etc., Ins. Co. *v.* Foote, 22 Ohio, 340, 348; Briggs *v.* U. A. Ins. Co., 53 N. Y., 346; Trans-Atlantic Fire Ins. Co. *v.* Dorsey, 56 Md., 70, 80; Heuer *v.* N. W. Nat. Ins. Co., 144 Ill., 393, 397.

Any other view than this would limit the operation of the condition to the one kind of explosion that does not involve ignition or combustion as its agent, when there is nothing in its terms to indicate that any such limitation was intended.

This identical clause was contained in the policy under consideration in Heuer *v.* Insurance Co., *supra*, wherein it was said by Mr. Justice Magruder, who delivered the opinion, in language that sets forth the very case we have here:

"The use of the expression 'explosion of any kind,' contemplates the existence of more than one kind of explosion. Without undertaking to make an accurate classification, we deem it sufficient to say, that one kind of explosion is that which is produced by the ignition and combustion of the agent of explosion, as where a lighted match is applied to a keg of gunpowder, and another kind of explosion is that which does not involve 'ignition and combustion of the agent of explosion,' as where steam, or any other substance, acts by expansion without combustion. Scripture *v.* Lowell Ins. Co., 10 Cush., 356. The exemption clause is broad enough to embrace both kinds of explosion. As the present case, where it appears that a lighted match was applied to the illuminating gas confined in the basement of a building, furnishes an instance of the first kind of explosion above specified, it manifestly comes within the terms of the exemption. * * * Where a lighted

match is applied to a keg of gunpowder, or to illuminating gas confined in a room, and an explosion thereby occurs which causes damage, but is not followed by combustion, the explosion is the proximate cause of the injury, and the lighted match is only the remote cause. In such case fire does not reach the property injured, but the concussion resulting from the explosion damages it. Here, the goods insured were not brought in contact with the fire produced by the lighting of the match, but with the explosive power of a fireless concussion, which caused the floor of the store in which they were situated to fall, and thereby occasioned the injury."

4. The fifth and last assignment is on exceptions taken to
39 the charge of the court explaining the meaning of the word explosion as used in the policy.

Referring to the testimony as it appears in full in the preliminary statement, it will be seen that several witnesses heard a loud report preceding the collapse of the building. Others heard a fizzing sound accompanied by the crash of the building and its contents. The witness Oliver, whose match ignited the vapor, said he heard a sound "like the swish of a whip," and then immediately became unconscious. Some evidence, denied by Oliver, tended to show that shortly after the accident he said that when he struck the match he heard a "sizz," and also that he said, "it blew up."

One of the plaintiff's witnesses saw a flash coming from the inclined cellar door opening on the sidewalk, which door, he thought, flew open.

The contention of the plaintiff, founded on the expert evidence of Professor Munroe, was that the collapse of the building was the result, not of explosion, but of rapid combustion of the gasoline vapor which first expanded the atmosphere of the cellar, and then, through cooling, produced a vacuum that caused the crushing in of the floor by the unresisted pressure of the external atmosphere.

Professor Munroe also testified that: "An explosion is the result due to the conversion of a solid or liquid into a gas, or the expansion of a gas, which is accompanied with a loud report and the shattering of the material about it."

Asked on cross-examination to draw a distinction between "quick combustion" and "slow explosion," he said: "It is exceedingly difficult to draw a sharp line between any systems of classification."

The court, after stating this contention and referring to Professor Munroe's definition, informed the jury that the parties to the contract are presumed to have understood the word "explosion" in its ordinary and popular sense—"not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word."

That "the question here being explosion or non-explosion is, what do you, as ordinary men, understand occurred at that time, in the light of all the testimony? Was it an explosion in the ordinary and popular sense of that word, or was it a fire with a subsequent explosion, or a subsequent collapse of the building as a sequence to the fire?"

That "an explosion produced by ignition, according to common

understanding, may be accurately enough described for practical purposes as a sudden and rapid combustion causing a violent expansion of the air and producing a report more or less loud according to the resistance offered. That it greatly varies in its degrees of violence and the effect produced, are facts fully within the experience of every one."

In our opinion this charge has application to the whole of the evidence, contains a correct declaration of the meaning of the exemption clause of the policy, and is an apt statement of the precise question to be determined by the jury.

Where the terms of a contract of insurance are clear and unambiguous they are to be taken and understood in their plain, ordinary, and popular sense. Imperial Fire Ins. Co. *v.* Coos Co., 151 U. S., 452, 463.

The last paragraph of the charge, as quoted above, was taken from the opinion of the court of appeals of Maryland, in a case which we have before referred to with approval. Trans-Atlantic Ins. Co. *v.* Dorsey, 56 Md., 70, 81. See, also, Insurance Co. *v.* Foote, 22 Ohio St., 340, 347.

This disposes of the last question in a case that has been conducted on both sides with signal zeal and ability.

Having found no error in the proceedings below the judgment will be affirmed with costs. It is so ordered. *Affirmed.*

40 WEDNESDAY, *March 7th, A. D.* 1900.

January Term, 1900.

MILTON C. MITCHELL, Appellant,
vs.
THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C., a Corporation. } No. 949.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

March 7, 1900.

41 Court of Appeals of the District of Columbia, January Term, 1900.

MILTON C. MITCHELL, Appellant,
vs.
THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C., a Corporation. } No. 949.

And now comes Milton C. Mitchell, appellant in the above-entitled cause, and moves that a writ of error issue to remove this cause to

the Supreme Court of the United States and to fix the amount of the bond for costs.

SAM'L MADDOX,
Attorney for Mitchell.

Writ of error ordered to issue and penalty of bond fixed at three hundred dollars.

M. F. MORRIS,
Associate Justice.

(Endorsed:) No. 949. Court of Appeals of the District of Columbia. Motion for allowance of writ of error to S. C. U. S. Order allowing same and fixing amount of bond. Court of Appeals, District of Columbia. Filed Mar. 20, 1900. Robert Willett, clerk.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Milton C. Mitchell, appellant, and The Potomac Insurance Company of Georgetown, D. C., a corporation, appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of March, in the year of our Lord one thousand nine hundred.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia,
By H. W. HODGES,
Assistant Clerk.

Allowed by—
M. F. MORRIS,
Associate Justice.

43 Know all men by these presents that we, Milton C. Mitchell, as principal, and Rezin W. Darby, as surety, are held and firmly bound unto The Potomac Insurance Company of Georgetown, D. C., a corporation, in the full and just sum of three hundred dollars ($300), to be paid to the said The Potomac Insurance Company of Georgetown, D. C., a corporation, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of March, in the year of our Lord one thousand nine hundred.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Milton C. Mitchell, appellant, *vs.* The Potomac Insurance Company of Georgetown, D. C., a corporation, appellee, a judgment was rendered against the said Milton C. Mitchell, and the said Milton C. Mitchell having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Potomac Insurance Company of Georgetown, D. C., a corporation, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Milton C. Mitchell shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

MILTON C. MITCHELL. [SEAL.]
REZIN W. DARBY. [SEAL.]

Sealed and delivered in the presence of—
THOS. C. WHEELER.

This bond is satisfactory.
GORDON & GORDON.

Approved by—
M. F. MORRIS,
Associate Justice.

[Endorsed:] No. 949. Milton C. Mitchell, appellant, *vs.* The Potomac Insurance Company of Georgetown, D. C., a corporation. Bond on writ of error to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Ap'l 5, 1900. Robert Willett, clerk.

44 UNITED STATES OF AMERICA, *ss:*

To the Potomac Insurance Company of Georgetown, D. C., a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's

office of the Court of Appeals of the District of Columbia, wherein Milton C. Mitchell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 5th day of April, in the year of our Lord one thousand nine hundred.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted April 5, 1900.

WILLIAM A. GORDON,
J. HOLDSWORTH GORDON,
For Defendant in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 5, 1900. Robert Willett, clerk.

45 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 44, inclusive, contains a true copy of the transcript of record and proceedings in the case of Milton C. Mitchell, appellant, *vs.* The Potomac Insurance — of Georgetown, D. C., a corporation, No. 949, January term, 1900, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 21st day of April, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,737. District of Columbia Court of Appeals. Term No., 623. Milton C. Mitchell, plaintiff in error, *vs.* The Potomac Insurance Company of Georgetown, D. C. Filed May 5th, 1900.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 51.

MILTON C. MITCHELL, PLAINTIFF IN ERROR,

vs.

THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C.

ARGUMENT AND BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

Statement of Facts.

This is a writ of error to the Court of Appeals of the District of Columbia seeking to reverse a judgment of that court entered in a suit instituted by Mitchell, the plaintiff in error, on a policy of insurance for the loss sustained by reason of an accidental fire. The insurance policy was for $5,000 on his stock in trade, which was completely destroyed on the 28th of September, 1896, and the claim of the declaration was for that amount, with interest from the 19th day of November, 1896. The property insured is described in the written part of the contract as follows:

"On his stock of stoves and their findings, tins and tinware, tools of trade and such other goods kept for sale in a

first-class retail stove and tin store, situate 3108 M street, Georgetown, D. C. Privilege granted to keep not more than five barrels of gasoline or other oil or vapor" (R., p. 5).

The indemnity was "against all such immediate loss or damage as may occur by fire to the property specified," and in very fine print there was a provision in the policy to the effect that the insuring company would not be liable "for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only." The policy also specified certain articles which might not be "kept for sale, stored or used on the premises in quantities exceeding one barrel at any one time without written consent," and if so kept, the policy should be void. Gasoline was not included in these inhibited articles (R., pp. 5, 6).

For this policy the last annual premium paid by the appellant was $72.50, distributed as follows: $25 on the gasoline and $47.50 on the rest of the stock (R., p. 9). It was in force on the 28th day of September, 1896, when a fire occurred, resulting in the demolition of the building and the practical destruction of the entire stock, excepting only the gasoline.

House 3108 M street, in which the insured commodities were stored, was a three-story brick building, erected in the early days of Georgetown. It was 17 feet front by a depth of 40 feet. All the stories were much cut up by openings for store door, show and other windows. The first floor was used as a store-room. Down the middle of this from front to rear was a platform in three tiers, containing stoves, ovens, and other weighty articles. Stoves were also placed along the east and west sides of the store-room. In the second and third stories surplus stock was kept, also composed of heavy stoves, heaters, ovens, etc. The store floor was supported by joists running east and west, which were very old, and a "condition of dry rot existed in most of them."

There was a back building about 9 feet wide and two stories high. The ground floor was divided into small rooms, one of which was used also as a store-room, though but few things were there exhibited. In this also was the pumping machinery for the gasoline tank in the cellar below. The other rooms of the back building were used as work-shops.

Under the main store-room there was a cellar 17 by 40 feet. It was reached by steps in the rear of the main building and was without windows. It was lighted only from the opening for the steps, and had no gas jets or artificial lighting of any kind. There was also an opening at the front, but over this were light pine doors, which were opened only when heavy goods were being put down from the street. These doors were used as a sort of show-case for tin cans, coffee pots, and other light ware. In this cellar were stored the heavier stoves and furnaces, and here goods were unpacked—a process which littered the floor with bits of tarred string, excelsior, and other inflammable substances.

Fire-brick and stove castings were kept on shelves, separated by upright posts and running along the east wall of the main cellar, the lowest shelf being about 18 inches from the cellar floor. These shelves were entirely open, and the different tiers or sections were called bins (R., p. 10).

This cellar, being lighted only by the opening for the back steps, was generally very dark, so it was necessary to use a match or a candle to find anything that might be wanted. Lighted matches were often dropped on the floor with no resulting injury, and frequently there were as many as half a dozen lighted candles sitting about on the cellar floor at different places, when there was much work to do (R., p. 7). In this front cellar also was a furnace which had been in use for many years, with the ash-box about three inches above the floor.

There was also a small back cellar, about 9 x 12 feet, which could be entered only by an opening from the front

cellar, intended as a doorway, but there was no door. The back cellar floor was 15 or 16 inches higher than the floor of the front cellar. The opening between the two cellars had a doorsill about 4 inches high, set in stone and mortar; otherwise the two cellars were separated by a brick wall. In the west wall of this back cellar was a small window, containing six panes of glass of the ordinary size. In this cellar also on dark days matches and lighted candles were used, and lighted matches were frequently left by the workmen on stoves and shelves or dropped on the floor. Scattered about were tarred strings and other inflammable substances, in which stoves and the lighter articles of stock had been packed.

Sunk into the floor of this cellar was the gasoline tank, made of cast iron, and having an iron cover. The top of it was 18 inches beneath the floor, and on this was put earth with concreting at the surface. The tank was supplied by a pipe opening only into the back store-room, and gasoline was drawn out of the tank for customers by automatic pumping machinery, also in the back store-room. This tank held a little more than five barrels. On Saturday, the 26th of September, two days before the fire, the supply of gasoline ran low and five barrels were ordered; but one came, and its contents were at once siphoned into the tank through the supply pipe. Much of this was sold later in the day, so the tank was practically empty all of Sunday and until about noon on Monday, when the other four barrels of gasoline, which had been ordered the Saturday before, were put into the tank.

On Monday, the 28th day of September, 1896, about one o'clock in the afternoon, Oliver, Mitchell's book-keeper and general manager, was alone in the store when a customer came who wanted a piece of casting such as was kept only in the cellar. Oliver went to get it. When he reached the cellar he noticed no smell of gasoline vapor, with which he was quite familiar. It is pungent, unmistakable, and easily

detected. The particular bit of casting wanted was on the shelf on the east side of the front cellar, about 15 feet from the entrance to the back cellar, and so far from the door that he could not see. He struck a match and commenced looking along the shelves, but before he found what he wanted, the match became short and burnt his fingers. Thereupon he dropped the first match, struck a second, and continued his search. Suddenly the cellar became enveloped in a blue flame, which Oliver recognized as burning gasoline vapor. He noticed the flame first "all over the cellar" (R., p. 8). There was no noise or sound as of an explosion; only a sh-sh-sh like the swish of a whip. He then became unconscious. On recovering consciousness, the first thing he noticed was that the back cellar was full of fire, and knowing the gasoline tank was there, he tried to get the other way. The building had collapsed, and the store floor joists had broken in the middle, one end of them resting on the cellar floor, the other against the east wall, near which Oliver found himself. Under these broken joists, through the debris, he worked his way to the front foundation wall. Through this a hole was dug by persons on the street, and Oliver was rescued, much scarred and singed. In the fall of the building the customer was killed.

The building had collapsed, and the stock of the plaintiff in error was injured to the extent of $4,568.80 (R., p. 9). This was the first and only time when anything like burning gasoline vapor had ever been noticed in Mitchell's cellar, though in busy seasons it was not unusual for matches to be lighted in the cellar every fifteen minutes of the day, and September was one of the busiest months.

The nature and characteristics of gasoline and gasoline vapor were shown by two experts called by appellant—Professor Munroe, of the Columbian University, and Mr. Howe, in charge of the naphtha department of the Standard Oil Company. According to them, gasoline will not burn and

is no more explosive than wood. A lighted match put into liquid gasoline will be extinguished.

The safest way of keeping it is in tanks, and it then is less liable to give off vapor. It generates vapor at all times, which has a distinctly recognized odor that cannot be mistaken. The vapor is three times as heavy as air and runs down hill like water, until it assumes a position of equilibrium, where, if not disturbed, it gives off a very slight odor. It can be ignited by a flame or an electric spark, and burns rapidly with a pale blue flame. It never ascends except by slow diffusion. To make an explosion sufficient to create a great amount of damage the vapor would have to be distributed generally throughout the cellar. Its presence under these circumstances would be detected by the odor. Undisturbed, layers of vapor might accumulate on the cellar floor in quantities sufficient, if ignited, to produce a partial vacuum by quick combustion. This, according to Mr. Howe, is the chief danger from the presence of vapor in the cellar.

In certain combinations with air—between 5 and 25 per cent.—it becomes an explosive. Over 25 per cent. and under 5 per cent. it is combustible only. And the explosion is most violent where there is 10 per cent. of vapor and 90 per cent. of atmospheric air.

According to Professor Munroe, one volume of gasoline will give off 140 volumes of vapor. To give a 3 per cent. mixture, a mild explosive, in the front cellar, would take 7.4 gallons of gasoline; a 10 per cent. mixture, 24.7 gallons; a 25 per cent. mixture, 61 gallons. To give a highly explosive mixture in the front cellar would take 24.7 gallons; that is 10 per cent.

To give a 3 per cent. mixture in the back cellar would take 1.91 gallons; a 10 per cent. mixture, 6.4 gallons; a 25 per cent. mixture, 15.94 gallons.

The tank contained 64,680 cubic inches and held just vapor enough to make a 3 per cent. mixture in the back cellar.

Professor Munroe also made some calculations with regard to air pressure, which showed that this pressure, which is 15 pounds per square inch upon an area equal to the surface of Mitchell's store floor, would be 641 tons. The pressure upwards being the same, equilibrium results. At the rate of one pound per square inch the pressure on an area the size of this store would be nearly 43 tons. The result of a rapid combustion of gasoline vapor in the cellar would be an expansion of the air in the cellar. On the completion of the combustion a vacuum would be formed by the cooling of this expanded air and the product of the combustion.

After hearing the testimony of the witness Oliver, Professor Munroe gave it as his opinion that the collapse of the building was due to the rapid combustion of some substance in the cellar, causing a partial vacuum, and an increased pressure downwards on the surface of the floor, causing it to give way.

Professor Munroe also defined an explosion as being "the result due to the conversion of a solid or a liquid into a gas or the expansion of a gas, which is accompanied with a loud report and the shattering of material about it."

Plaintiff in error also produced as witnesses five persons, all quite near his building at the time it collapsed. None of them heard any sound like an explosion. Several of them described the noise they noticed by the sound "feu-feu," which they compared to the noise made by the burning of a bad firecracker.

The insurance company relied, by way of defense, upon the provision of the policy which exempted the underwriter from liability for damage caused by explosions of any kind, though it was not shown that this provision, which was in very fine print, had been called to the attention of Mitchell. Four witnesses were also called, all of whom were more than a block away from Mitchell's building at the time of the occurrence. They described the noise as an explosion, which

one of them illustrates as being like "the noise of the sun-down gun over at Fort Myer" as heard in Georgetown.

On these facts and certain rulings of the trial court, to which exceptions were taken, a verdict was rendered in favor of defendant company. A motion for a new trial was interposed and overruled, and thereupon judgment was entered on the verdict. From this judgment the plaintiff below appealed to the Court of Appeals, where the judgment was affirmed (16 D. C. App., 241).

ASSIGNMENT OF ERRORS.

The Court of Appeals erred—

1. In sustaining the trial court in its refusal to grant the first prayer asked by counsel for the plaintiff; which prayer is as follows (R., pp. 22, 23):

"If the jury find from the evidence that on the 28th day of September, 1896, at or before the time the witness Oliver went into the cellar of the plaintiff's premises, as described by him, a fire originating in accidental or other causes was in progress in the back cellar of said premises, and that afterward and while such fire was in progress the gas or vapor generated by the evaporation of liquid gasoline came in contact with the flames of such fire and exploded and prostrated portions of the building in which the insured commodities were stored, then the damage done to such commodities by reason of such prostration was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

2. In sustaining the trial court in such portions of the charge to the jury as instructed them that gasoline was not one of the articles covered by the insurance, but was inserted to "offset the forfeiture of the policy," the parts of the charge referred to being as follows (R., pp. 25, 26):

"You hardly need be told, I think, as ordinary business men, that a privilege to keep something does not bring the

privileged article within the articles insured by the policy. Suppose that clause read 'privilege to keep not more than fifty pounds of gunpowder' on the premises, and the party insured was keeping a dry-goods store or a drug store, would it be contended by any sensible man that the gunpowder was an article insured by the policy? Clearly this privilege to keep was inserted to offset the forfeiture of the policy if the provisions contained in this policy were violated without this privilege, and that provision is this:

"'If gunpowder, phosphorus, naphtha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time, without written consent of the company,' the policy should be void.

"So that if these five barrels of gasoline were kept upon those premises without the written consent of the company, the policy would have been absolutely forfeited and the plaintiff would not have been entitled to recover damages for loss if the whole stock had been destroyed by fire."

3. In sustaining the trial court in its refusal to grant the third prayer asked by counsel for the plaintiff, which prayer is as follows (R., p. 23):

"If the jury find from the evidence that the liability to explode with destructive force is one of the incidents of gasoline vapor under certain conditions, then the defendant company will be presumed to have contemplated such effects as fire might or would naturally produce on such vapor when it issued the policy of insurance sued on in this action, and if the jury further find from the evidence that the prostration of a portion of the building in which the insured articles were stored and the resulting damage to such articles were occasioned by an explosion of gasoline vapor having its origin in fire, the plaintiff is entitled to recover in this action."

4. In sustaining the trial court in granting the first, second, third, and fourth prayers asked by counsel for the defendant, which prayers are as follows (R., pp. 23, 24):

"1. If the jury find from the evidence that the plaintiff

had stored in the cellar of his premises gasoline or other oil or vapor, and that from a leaky condition of the receptacle in which such gasoline, oil, or vapor was kept or from any other reason the said cellar had become permeated to a great or small degree with escaped or escaping vapors, and that a burning match in the hands of an employé of the plaintiff or dropped by said employé of plaintiff, being brought into contact with such escaped or escaping vapors, caused an explosion, and that the damage, if any, to the chattels of the plaintiff resulted solely from such explosion, they should render a verdict for the defendant.

"2. The jury are instructed that a lighted match held in the hand of an employé of the plaintiff, from which an explosion is caused resulting from ignition of vapors from oil or gases, is not to be considered 'fire' in the meaning of the policy sued on.

"3. If the jury find from the evidence that an explosion or ignition of explosive matter not caused by a preceding fire took place on the plaintiff's premises, and that the loss or damage, if any, to his merchandise was caused solely by said explosion or ignition of explosive matter, then the plaintiff is not entitled to recover.

"4. If the jury find that there was in the cellar of the premises occupied by the plaintiff as a store gasoline or other vapor oil, and that an employé of the plaintiff going down in the said cellar ignited a match, and that in consequence of said ignition of said match, acting alone, an explosion occurred prostrating the building in which plaintiff kept his store, they cannot find for the plaintiff for such loss or damage as was occasioned to his goods by such explosion and falling of the building, and their verdict should be for the defendant."

5. In sustaining the trial court in such portions of the charge to the jury as instructed them that the word "explosion," where used in the policy of insurance, must be restricted to the meaning given it by "ordinary men," the parts of the charge referred to being as follows (R., p. 27):

"Now, gentlemen of the jury, when the word 'explosion' was used in this policy, the company, as ordinary men—at least its officers were ordinary men and not, I assume, scientific men—and the party insured, an ordinary man, are pre-

sumed to have understood the word 'explosion' in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word. And, after all, the question here being explosion or non-explosion, is, what do you, as ordinary men, understand occurred at that time in the light of all the testimony? Was it an explosion in the ordinary and popular sense of that word, or was it a fire with a subsequent explosion or a subsequent collapse of the building as a sequence to the fire?"

POINTS AND AUTHORITIES.

I.

Plaintiff's first prayer should have been granted, as there was some evidence tending to prove that there was fire in the back cellar at the time Oliver struck the second match.

It is a well-settled rule of law that whenever there is a question of fact before the court and there is any testimony, no matter how slight, tending to prove the existence of such fact, the question is one within the peculiar province of the jury, and it is reversible error in the court to withdraw it from them.

As was said by Mr. Justice Brewer, in delivering the opinion of the court in Richmond, &c., R. R. Co. *vs.* Powers (149 U. S., 43):

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

Here the undisputed fact is that there was fire in the back cellar after the building collapsed, and nowhere else. It

was in this part of the cellar that gasoline vapor was most likely to be. Here the gasoline tank had been sunk into the ground, with the supply pipes leading directly to the store floor just above; and it will be remembered that this tank was practically empty from Saturday till Monday, the day of the accident. During this period vapor was being thrown off, for gasoline generates vapor all the time and at all ordinary temperatures (R., p. 14). When the four barrels of gasoline were put into the tank at eleven o'clock on Monday morning, the vapor formed during the preceding thirty-six hours was forced upward, and necessarily escaped first into the back cellar. Before it could flow thence to the front cellar, its volume must have been sufficient to cover the back-cellar floor to a depth of four inches. Otherwise it could not get over the doorsill of the opening between back and front cellars, for between these cellars there was a solid brick wall, with an opening for a door, with a sill "four inches higher than the back-cellar floor" (R., p. 7).

"Gasoline vapor is about three times as heavy as air and falls through the air. It flows like a liquid over the surface on which it is until it has reached the lowest point, like all other liquids, tending to assume a position of equilibrium" (Prof. Munroe, R., pp. 13, 14). Mixed with air, in proportions from 5 to 25 per cent. of vapor to 95 or 75 per cent. of air, it is an explosive, the maximum violence being reached when the mixture is composed of 10 per cent. of vapor and 90 per cent. of air. When the proportion of vapor to air is under 5 and over 25 per cent. it is not explosive, but a vigorous puff results on the ignition of the mixture.

The volume of the front cellar was 4,653 cubic feet and of the back cellar 1,252 cubic feet. If the tank were empty of gasoline the volume of vapor it might contain, if forced out, would be 3.1 per cent. by volume of the cubic contents of the back cellar, not sufficient to make an explosive mixture

if equally distributed throughout the back cellar, and practically harmless if let loose in the front cellar.

The vapor in the cellar the day of the accident must have been such as was forced out of the tank when the four barrels of gasoline were put into it about eleven o'clock the same morning, for "gasoline vapor dissipates when it is exposed unconfined to another atmosphere. The rapidity with which it dissipates depends upon circumstances. If it is constantly stirred by persons walking through it or in any other way, it dissipates very rapidly" (Prof. Munroe, R., p. 14). All the evidence shows that at no other time, except upon the forenoon of the accident, when the tanks, which had been empty thirty-six hours, were filled with liquid gasoline, had vapor accumulated in either cellar in combustible quantities.

Matches were lighted many times a day in both cellars, and there were frequently half a dozen lighted candles sitting round the cellar floor during busy seasons (R., p. 7). The burst of flame that Oliver first saw all over the front cellar might well have come from the back cellar through the opening for a door between the two.

After the collapse Volkman saw a "little blaze oozing out quite near the back-cellar steps," and called a fireman to put it out (R., p. 10).

Andrew J. Sullivan, a witness for the insurance company, himself the foreman of a fire-engine company, saw "smoke coming out of the cellar at the end wall of the back building." He looked in and saw "a can on a barrel, a pint cup, and there was a little blaze coming out of it, with something in it burning" (R., p. 18). The jury may well have inferred that this "little blaze" coming from the "pint cup" had caused the explosion, if there was one.

Kurtz, another of the company's witnesses, also connected with the city fire department, saw "a fire in the cellar and called a fireman to bring his stream and put the fire out." "It was in the southwest corner of the main cellar, about ten

feet from the west wall" (R., p. 18), or just alongside of the opening into the back cellar.

Oliver thus describes the conditions as he observed them:

"The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and, knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. I crawled towards the front, where I was pulled through the front wall" (R., p. 8).

There was not the slightest trace of fire in the front cellar after the collapse and none when Oliver went down. And there could not have been any vapor in the front cellar, for even if Oliver had not detected the odor, its presence must have developed while the first match he lit was burning. It was while he was continuing his search along the shelving of the east wall of the front cellar by the aid of the second match, that he first noticed any signs of fire.

The conclusion is, therefore, almost inevitable that there was fire at the same time in some other part of the cellar, and it could only have been in the back cellar, otherwise Oliver must have seen it as he walked across the front cellar towards the east wall.

In the back cellar goods were unpacked and pieces of tarred string, bits of paper, excelsior, and other inflammable substances sometimes fell upon the floor and were scattered about. In this back cellar, too, workmen lit matches, and, when they had found what they wanted, frequently dropped them on the floor or put them on the stoves or castings, without thought of danger. In this way a piece of tarred string might have been ignited on that Monday morning, and, after burning for some minutes, dropped to the floor, where, as has been shown, gasoline vapor was most likely to be. And a little blaze might have been in the back cellar without attracting Oliver's attention when he went into the front cellar—he was moving in an opposite direction.

There was no odor of gasoline vapor in the front cellar when Oliver went down, for otherwise he must have detected it. He knew "the odor, which is pungent, unmistakable and easily detected" (R., p. 7). "A person could not go into a room charged with gasoline vapor without detecting the odor" (Howe, R., p. 13).

Oliver also knew of the explosive qualities of such vapor, and had there been the slightest trace of its presence in the front cellar he could not have lit a match except on the theory of suicidal intent, which was not brought out in the evidence.

The fire that Oliver saw in the front cellar while his second match was burning was a flame of a "bluish color" (R., p. 8), such as gasoline vapor makes, and he describes it as being all over the cellar at once. He was much confused by what happened and could not say where the fire started, but Professor Munroe says that "a person igniting gasoline vapor with a match could not fail to be aware of the fact" (R., p. 14).

The plaintiff's first prayer was properly framed to suit these facts, which were undisputed, and therefore fair-minded men might "draw different conclusions from them." To refuse the prayer was, therefore, reversible error.

Curiously enough, the learned justice who presided over the trial before the jury seems to have been of the opinion that this or some similar instruction should have been granted, for he says in his charge to the jury (R., p. 26):

"The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to the fire," &c. * * *

This is exactly what was aimed at in the plaintiff's first prayer, except that it limited the *locus* of the antecedent fire

to the back cellar, the only place it could possibly have been. The prayer was refused, and no other on the point was asked or given.

Plaintiff's second prayer dealt with an entirely different proposition—the vacuum theory. Its predicate was that if the "loss or damage was the result of fire not having its commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises," &c. As will be observed, it contains no reference to damage caused by an explosion, whether originating in fire or otherwise.

If the jury had found that there was fire, however slight, in the back cellar, just before the explosion and causing it, their verdict must have been for the plaintiff.

The leading case in support of this proposition is Transatlantic, etc., Ins. Co. *vs.* Dorsey, 56 Md., 70, wherein Mr. Chief Justice Alvey announced the opinion of the court as follows:

"Where a fire has occurred, and is in progress, the effects of which are covered by the policy, and an explosion takes place as an incident or result thereof, so as to increase the loss, whether the whole of the damage or loss thus produced can be regarded as within the protection of the insurance, in a case where the policy contains the exemption from liability for explosions, has been the subject of some diversity of judicial opinion. We think, however, both upon reason and the established rules of construction, that such loss should be regarded as within the risk assumed by the insurers. In such case, the fire is the direct and efficient cause of the loss, and the explosion but the incident, and if the insurers intend to exclude such liability, they must do so by plain and unambiguous terms. Indeed, the difficulty in such case as ascertaining and distinguishing the loss to be attributed to the fire from that caused by the explosion—separating the actual or probable effects of the explosion from those produced or that would have been produced, but for the explosion, by fire—at once furnished strong reasons for including the effect of the ex-

plosion in the loss occasioned by the precedent fire, producing the explosion. The contrary construction would do much to impair the security that should be offered, by policies containing the clause in question" (79).

See also Washburn *vs.* Farmers', &c., Ins. Co., 2 Fed. Rep., 304.

And Washburn *vs.* Miami, &c., Ins. Co., 2 Fed. Rep., 633.

In La Force *vs.* The Williams City Ins. Co., 43 Mo. App., 518, it appeared that a servant sprinkled gasoline on the kitchen floor to kill vermin. Some of it trickled through cracks and formed vapor under the floor. Later in the day the servant dropped a lighted match on the floor. There was no explosion, but the servant noticed that some of the liquid gasoline was burning. After a few minutes the wainscoting became ignited and an explosion followed. *Held*, insurer responsible for full amount of loss.

The court say:

"A contract drawn by the insurer, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary, and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the insured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the insured" (530).

II.

Gasoline was part and parcel of the goods kept for sale by the assured, and was, and was intended to be, protected by the insurance.

The property insured is thus described in the written part of the policy:

"On his stock of stoves and their findings, tins and tinware, tools of trade and such other goods kept for sale in a

first-class retail stove and tin store, situate 3108 M street, Georgetown, D. C. Privilege granted to keep not more than five barrels of gasoline or other oil or vapor" (R., p. 5).

The indemnity provided is "against all such immediate loss or damage as may occur by fire to the property specified."

Gasoline was one of the articles kept for sale by the assured. In fact, he dealt largely in that commodity, having elaborate machinery for supplying customers and guarding against accident. The quantity specified in the contract was sufficient notice to the insurer that it was kept for sale, for as much as five barrels of gasoline could not be needed in a stove store for any other purpose. So the concluding sentence of the description of the property insured should be read as follows: "Privilege granted to keep *for sale* not more than five barrels of gasoline or other oil or vapor."

The words "such other," as used in the description of property insured, in the sentence "tools of trade and such other goods kept for sale," would ordinarily restrict the liability of the underwriter to damage to goods of *kindred nature* with "tools of trade." But this could not have been the intention of the parties, for, if so, Mitchell might have carried in his stock for sale tools of any trade or business, however hazardous, thus greatly increasing the risk. Equally unreasonable would it be to construe this sentence as referring to the tools of his trade, for, naturally, they were not kept for sale. So, to arrive at a proper interpretation of the property description, the word "other" must be eliminated as misleading or superfluous, and the words "as are" interpolated after the word "trade," thus making the concluding sentence read as follows: "Tools of trade and such * * * goods (as are) kept for sale in a * * * stove and tin store, situate 3108 M street, Georgetown."

Such a reading embodies the contract of the parties in its entirety. The agent of the insurance company knew, or

must be presumed to have known, what kind of goods the assured intended to keep for sale, and it was the manifest intention of both parties that that stock—all of it, not one article more than another—should be insured against damage by fire. It could not be successfully contended that if an ordinary fire had occurred, unattended with explosive incidents, and injuring or destroying the gasoline on hand, its value would not have been an item in the computation of the loss or damage sustained by the assured. This is in perfect accord with the indemnity clause which insures against loss or damage to the property "specified," gasoline being one of these articles.

The learned justice who delivered the opinion of the Court of Appeals construes this clause as if it read "such goods as are usually kept for sale in a first-class retail stove and tin store" (R., pp. 41, 42); but it is submitted that the language used is not susceptible of such an interpretation. To sustain this argument the language of the policy is quoted as follows: "kept for sale in a first-class retail stove and tin store situate in Georgetown, D. C." If that were the language used, there might be some ground for the contention; but the very important words "3108 M street" are left out of the quotation. These words limit the inquiry to that particular store, and would have prevented the introduction of evidence touching the custom of other stove stores in Georgetown, if any there be.

All of the cases cited in the opinion of the Court of Appeals in support of this proposition, without exception, turned on general expressions used in the contracts of insurance, under which evidence of custom was admissible.

For purposes of illustration several of these will be noticed.

In Steinbach *vs.* Insurance Co., 13 Wall., 183, the policy covered "other articles in his line of business."

In Phœnix Insurance Co. *vs.* Taylor, 5 Minn., 393, the

words employed were, "and such other goods as are usually kept in a general retail store."

In Maril *vs.* Conn. Fire Insurance Co., 95 Ga., 605, the policy contained the words "and other material usual to a jewelry stock in and out of safes."

And so, substantially, of all the rest.

In the policy under discussion the property description relates, not to such goods as are usually found in retail stove and tin stores, but to the stock of goods kept for sale in a particular retail store, viz., 3108 M street. The words descriptive of this store—"first class"—can only be considered a bit of gratuitous advertising. Under this contract evidence tending to show the custom of other retail stove and tin stores, whether in Georgetown, Washington, or elsewhere, would be clearly inadmissible.

The learned justice who presided over the jury trial, in referring to the gasoline clause of the written description of the property kept for sale, says (R., p. 25): "Clearly this privilege to keep was inserted to offset the forfeiture of the policy;" and also (R., p. 26): "So if these five barrels of gasoline were kept upon the premises without the written consent of the company, the policy would have been absolutely forfeited." This is manifest error, for gasoline is not one of the inhibited articles specified as working a forfeiture of the policy if kept without the consent of the insuring company. "Naphtha" is mentioned, and "benzine," both distillates of crude petroleum, but gasoline is not mentioned and seems to have been purposely omitted. Whether this be so or not, it could not be added by the court below, when the effect of such an addition would be to vary the contract of the parties, if not work a forfeiture of it. The rule in such cases is that the court is bound to construe the contract as strongly against the insurer and as favorably for the insured as its terms will reasonably permit. Another rule, equally familiar and equally well established, is that provisions for for-

feitures, even where the intent is doubtful, are to receive a strict construction against those for whose benefit they are introduced.

From the record it is manifest that Mitchell's stock consisted principally of stoves and tinware—a fact which was known to the agent of the underwriters. To such a stock the direct danger from fire was very slight, so the rate of insurance was proportionately low. If, in addition to this stock, Mitchell had desired to carry a line of inflammable articles, such as wicker baskets, he would have made that fact known to the agents of the insurance company, paid an additional premium, and procured the "privilege," to be incorporated in the written part of his policy. Then, in the event of a fire and the destruction of the baskets, the insurance company would not have been heard to say that these baskets were not within the protection of the policy. So, also, of the gasoline.

III.

The liability to explode with destructive force being an incident of gasoline vapor when ignited, it is no defense to this action to allege that the damage was occasioned by an explosion, if the explosion originated in fire, and gasoline vapor was the explosive agent.

The plaintiff in error knew the danger of keeping gasoline—knew that the vapor from it burned very rapidly (R., p. 11)—and he was willing to pay the high premium charged for keeping as part of his stock in trade so hazardous an article of merchandise. The purpose of the written part of the contract is obvious—insurance against perils by fire, all of them, not one more than another, of keeping gasoline. To emphasize this intent, and to remove any possible suspicion that Mitchell might have had that he was not fully protected, the word "vapor" was included in the written part of the policy, prepared by the agent of the underwriter.

If any of the printed conditions are repugnant to this main purpose they must yield; otherwise the policy becomes a mere deception instead of the protection which the parties to it designed.

In a policy of insurance covering goods in a store there was a provision to the effect that the policy would be null and void "if said property is sold and conveyed." Commenting on this, the court say:

"Is this proviso applicable to the particular goods in the store at the date of the insurance? Clearly not, for the first sale at the counter would avoid the policy.

"Indeterminate forms of expression are to be understood in a sense subservient to the general purpose of the contract.

"Conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.

"Nothing but the clearest expression of such a design would justify the assumption that an executed contract was intended by either party as a snare. If technical forfeitures could be sustained by such intendments, the effect would be to weaken private confidence in commercial faith, and occasion just solicitude as to the security of important rights.

"It ought not to be possible to charge that insurers aim at drawing customers into the payment of premiums by holding out illusory promises, couched in vague and deceptive terms, for the very purpose of enabling them to elude liability."

Hoffman *vs.* The Ætna, &c., Ins. Co., 32 N. Y., 405.

In Viele *vs.* German Ins. Co., 26 Iowa, 66, the policy covered a factory of encaustic window shades. It expressly prohibited the keeping of benzine on the premises. There was proof that benzine was used in the manufacture of paints and varnishes. The company was held liable on the ground that insurance on a factory covered incidents.

In Branard *vs.* Nat'l Fire Ins. Co., 27 Mo. App., 26, the defense was that gunpowder and petroleum were kept in the building, contrary to the inhibitions of the policy. The

reply to this defense was that it was written in the *written part of the policy* that the building was occupied as a general store, and that the keeping or use of gunpowder or petroleum was customary in country stores. *Held*, that the reply was good, and the plaintiff recovered.

See, also, Fraim *vs.* Ins. Co., 170 Pa. St., 151.

Faust *vs.* Ins. Co., 91 Wisc., 158.

The books abound in such decisions as these.

"A policy of insurance is to be interpreted like any other contract, so as to give effect to the mutual intention of the parties, and when it is partly written and partly printed, the written parts control the printed parts, and in case of repugnancy between the two the printed parts must be disregarded; and the contract is to be explained by reference to the circumstances under which it was made, and in case of uncertainty is to be interpreted most strongly against the party who caused the uncertainty to exist."

Yoch *vs.* Home Mutual Ins. Co., 111 Cal., 503.

(In this case the policy of insurance against loss by fire covered, in writing, a "stock of merchandise" such as is usually kept in a country store, and a printed condition in the policy rendered it void, "any custom of trade or manufacture to the contrary notwithstanding," if gasoline should be kept, used, or allowed upon the premises, "unless otherwise provided by agreement endorsed herein or added hereto." Evidence is admissible to show that gasoline is one of the articles of merchandise usually kept in a country store, and that the insured was in the habit of selling it at retail as part of his stock of merchandise, and it properly follows from such proof that gasoline was part of the subject of insurance, and that the assured did not violate the policy by keeping it in stock.)

As has been shown, gasoline was as much covered by the insurance as any other article of merchandise in Mitchell's store. In its liquid state gasoline will not burn. A lighted

match put into a barrel of gasoline will be extinguished. "It is no more explosive than wood or any other substance." As kept by the plaintiff in error—in an iron tank eighteen inches under ground—there was absolutely no danger of fire from the gasoline itself; but the vapor of gasoline, in certain proportions of vapor to air, is an explosive of high power, and when ignited is as certain to explode as gunpowder or any other explosive agent. When undisturbed, it assumes a position of equilibrium, and if, in that condition, it comes in contact with fire, a vigorous puff results, so vigorous as to leave the impression on the mind of an "ordinary" man that an explosion has occurred. Even Professor Munroe, a scientist of large experience, when asked to draw a distinction between "quick combustion" and "slow explosion," answered, "It is exceedingly difficult to draw a sharp line between any systems of classification."

Wherefore the insurance company ought not to be heard to say that it insured an explosive only in the event it did not explode—practically the only thing gasoline or its vapor can do when brought into contact with fire.

"Where camphene, or any hazardous fluid, is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken that effect should be given to the policy accordingly, unless a different intention is very plainly declared. And such an intention, instead of being hidden away in printed forms, remote from the principal contract, ought to be found in deliberate expressions, which are made use of at the time when the contract is entered into. Without doubt all the printed conditions and specifications annexed to a policy are, or at least may be, a part of it. But they relate to insurance in general, as practised by the underwriters, and upon, or within, those forms the parties to each policy actually issued write their own particular intentions. The plain meaning of the written part should, therefore, prevail, and other clauses must yield, if repugnant, or they must be construed so as to avoid a conflict of intention. In this case, I think, the perils of keeping and using camphene were insured

against, so far as the keeping and use of it were permitted at all, and that the clause which exempts the issuer from liability should be understood as applying to the presence of the articles under other conditions."

Harper *vs.* N. Y. City Ins. Co., 22 N. Y., 441–'4.

The point is exhaustively discussed and decided in favor of the contention of plaintiff in error in

Lynn Gas Co. *vs.* Meridian Ins. Co., 158 Mass., 570 (also reported in 20 L. R. A., 297).

"The subject-matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies, used in furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity."

In the present case the defendant in error, the insurance company, knew that Mitchell intended to deal in gasoline and charged him a high-rate premium for including it in the property specified as the stock in trade, and the company "must be presumed to have contemplated such effects as fire might naturally produce" when brought into contact with gasoline vapor.

Plaintiff's third prayer, which embodied the principle now contended for, was correctly addressed to the facts as developed by the evidence, being as follows (R., p. 23):

"if the jury find from the evidence that the liability to explode with destructive force is one of the incidents of gasoline vapor under certain conditions, then the defendant company will be presumed to have contemplated such effects as fire might or would naturally produce on such vapor when it issued the policy of insurance sued on in this action; and if the jury further find from the evidence that the pros-

tration of a portion of the building in which the insured articles were stored and the resulting damage to such articles were occasioned by an explosion of gasoline vapor having its origin in fire, the plaintiff is entitled to recover in this action."

This prayer should have been granted. To refuse it was manifest error.

The vice in all of the four prayers granted at the request of defendant's counsel consists in the illogical proposition that a burning match is not fire. True it may be that the theory that a lighted match, a candle, or a gas jet, if it causes an explosion, though clearly fire, is yet not fire within the meaning of a policy of insurance finds support in several cases of undoubted authority. It seems to have started with

Briggs *vs.* N. A., &c., Ins. Co., 53 N. Y., 446;

and was followed in—

United Life, &c., Ins. Co. *vs.* Foote, 22 Ohio St., 340;
Transatlantic, &c., Co. *vs.* Dorsey, 56 Md., 70.

But the logic of these cases may well be questioned. In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote, for the agent is one and the same throughout, namely, fire. The *causa* was burning gasoline vapor; the *causa causans* was a burning match; at each stage of the causation it was the action of *fire*. Suppose that when the witness Oliver went into that cellar he had quickly found the piece of casting called for by the customer, and had dropped the lighted match on the cellar floor, and then returned to the store; that this lighted match had set fire to pieces of tarred string or bits of excelsior which were left on the floor when stoves and lamp chimneys were unpacked, and that these articles, after burning for some min-

utes, had ignited the gasoline vapor and produced the explosion. On the authorities there can be no doubt that any loss occasioned by such an explosion would have been within the insurance, and it seems to be a frittering away of substantial rights to require any such flimsy intermediaries between the burning match and the burning vapor. Mitchell's indemnity was "against *all* such immediate loss as may occur by *fire*," and, as was shown in the evidence, the action of fire on gasoline vapor is either explosion, as scientists understand that word, or such rapid combustion as will cause "ordinary men" to believe an explosion has actually happened, and no other agent than fire will cause an explosion of gasoline vapor.

The word "explosion," as used in the printed clauses of the policy, must be restricted to such explosions as do not originate in fire. The "fire" referred to in the indemnity clause is not limited to the burning of some one or the other of the articles insured, but, in the broadest terms, includes *fire* in any and every manifestation of it.

The learned justice in the trial court was so enamored of this fallacy as to tell the jury that the plaintiff could not recover for any damage resulting from "rapid combustion" if started by the "lighted match held in Mr. Oliver's hand" (R., p. 27). He had previously granted the second prayer asked by counsel for the plaintiff (R., p. 23) as follows:

"If the jury believe from the evidence that on the 28th day of September, 1896, the commodities of the plaintiff mentioned in the policy of insurance, offered in evidence, were destroyed or injured or lost in the manner testified to by the plaintiff's witnesses, and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured

was the immediate result thereof, then the loss was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

The "lighted-match" restriction in the charge, and the prayers granted on the request of defendant's counsel practically withdrew the case from the consideration of the jury, for the plaintiff could not thereafter contend that he was entitled to recover if the building collapsed by reason of a vacuum created by the sudden "combustion of any non-explosive substance in the cellar."

After having heard the testimony of the witness Oliver, Professor Munroe expresses the following opinion (R., p. 15):

"From the testimony, as I heard it, I am of the opinion that the building was prostrated through the combustion of some body there or some substance there that burned rapidly, and that as a result of this rapid combustion, there being, according to Mr. Oliver's testimony, but a psh-ing sound in the burning by the increased pressure, the floor was raised to a slight extent, and then, by the condensation, there was a pressure brought to bear upon the upper surface of the floor, and then it gave way. That, from my observation and hearing his testimony, is the impression I have got and the opinion I hold."

But the learned justice in the trial court told the jury, substantially, that if the prostration of the plaintiff's building was the result of a partial vacuum in the cellar, caused by the rapid combustion of gasoline vapor, even though unaccompanied with an explosion of any sort, the damage thereby occasioned was not a loss within the protection of the policy, if the combustion started with a match held in Oliver's hand.

He had previously ruled that there was no evidence of fire in the back cellar, and there was no fire in the front cellar except the lighted match, otherwise Oliver must have

seen it. So the effect of this last instruction was to tell the jury that there was no fire anywhere in the plaintiff's premises on the day of the accident within the meaning of the policy of insurance, and was, of course, tantamount to directing a verdict for the defendant, which was ultimately rendered.

The court below was clearly wrong in that portion of the charge to the jury which restricted the meaning of the word "explosion" to what the "ordinary man would understand to be meant by that word." This is utterly at variance with the requirements of the well-settled rule of interpretation as applied to insurance contracts, which is—

"That where a contract of insurance is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that *reasonably, intelligent men* on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the assured."

Imperial Ins. Co. *vs.* Coos Co., 151 U. S., 462.

It is also at variance with that other well-established rule which holds that—

"Conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a *strict* construction against those for whose benefit they are introduced."

Hoffman *vs.* Ætna. &c., Ins. Co., 32 N. Y., 405.

In the present case we have a rational definition of the word explosion from Prof. Munroe, presumably a "reasonably intelligent man." According to this an explosion "is accompanied with a loud report." But the witnesses who were near the building at the time of the accident heard no such report; only a noise such as is made by a bad firecracker or the "vigorous puff" of burning gasoline vapor. While no "reasonably intelligent man" would characterize such an occurrence as an "explosion," an ordinary man

might do so, especially in a community where, as in Georgetown, even the policemen are startled by the sound of "the sun-down gun, * * * at Ft. Myer," more than a mile away.

For these reasons it is respectfully submitted that the judgment of the court below should be reversed.

SAMUEL MADDOX,
Attorney for Plaintiff in Error.

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No. 51.
Brf. of Gordon for Appellee

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MILTON C. MITCHELL, PLAINTIFF IN ERROR,

vs.

THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C.

BRIEF FOR APPELLEE.

J. HOLDSWORTH GORDON,
Attorney for Appellee.

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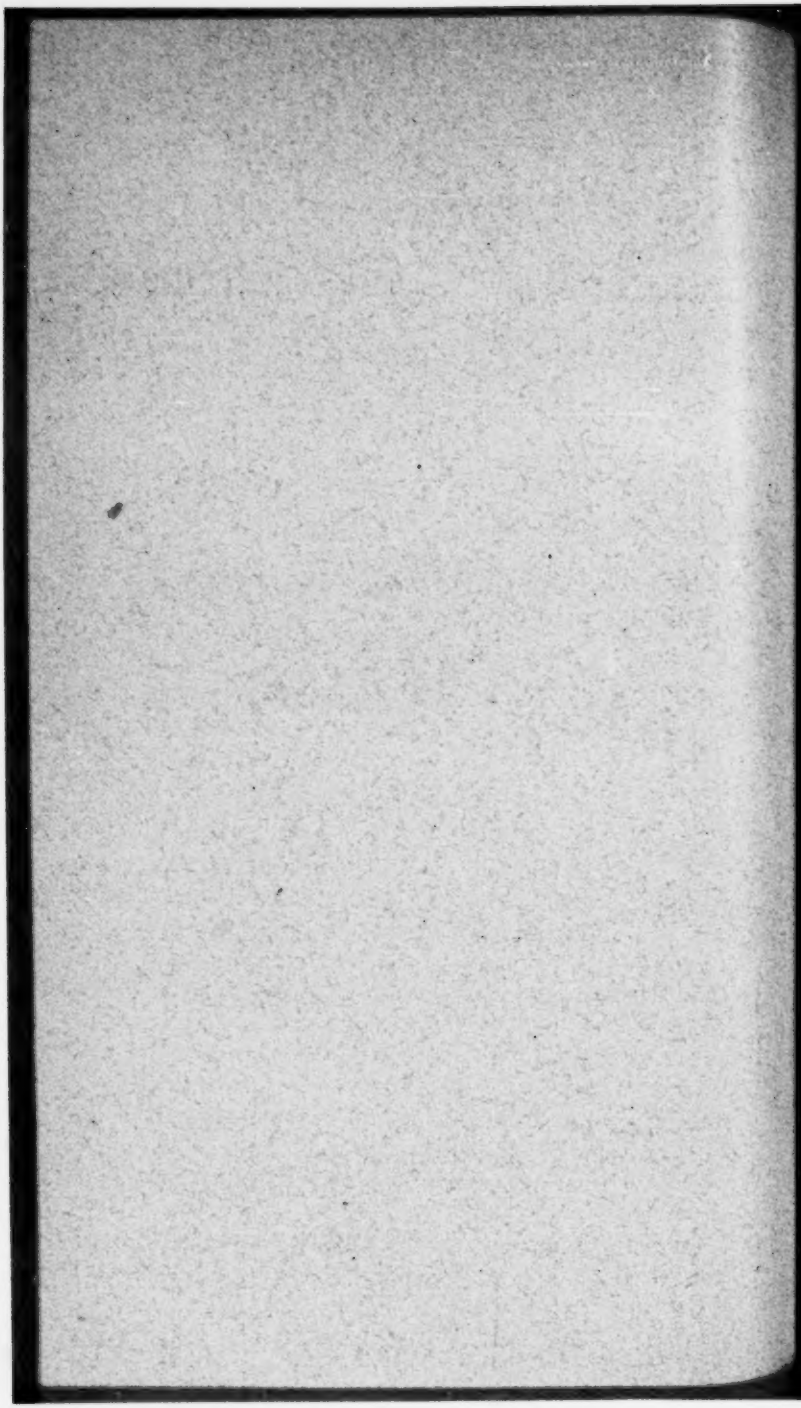

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THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

On February 3, 1893, a certain policy of insurance, in due form, was issued by the Potomac Insurance Company, appellee herein, to Milton C. Mitchell, the appellant, which recited that the said company, in consideration of the sum of fifty dollars, insured from loss or damage by fire to the extent of five thousand dollars, the appellant's stock of stoves and tin findings, tins and tinware, tools of trade and such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C., with the "privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor" (Rec., p. 5). For this latter privilege an additional sum of twenty-five dollars was paid.

The policy, however, declared that said assurance against fire was made and granted subject to all the covenants and

conditions contained therein, amongst which appear the following:

> "It being covenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or *explosions of any kind* unless fire ensues, and then for the loss or damage by fire only" (Rec., p. 5).

It is further provided that if—

> "gunpowder, phosphorus, naphtha, benzine or crude earth or coal oils, etc., are kept on the premises . . . or kept for sale . . . in quantities exceeding one barrel at any one time, without written consent, or if the risk be increased by any means within the control . . . of the assured, the policy should *be void*" (Rec., pp. 5 and 6).

While said policy was still in force, to wit., On the 28th day of September, 1896, the building No. 3108 M street was demolished and the goods of the appellant almost totally destroyed. The appellant in his declaration claimed that his goods were—

> "*burnt, consumed, and destroyed by fire*, which did not happen by invasion, insurrection, riot, civil commotion, military or usurped power" (Rec., p. 2);

and claimed a loss of five thousand dollars.

To this declaration the appellee pleaded that the corporation was not indebted as alleged, and further specially denied that the goods, chattels, etc., upon the premises 3108 M street, were burnt, consumed and destroyed by fire, as alleged, claiming that the damage and loss aforesaid was the result of *an explosion, and not the result of fire*, and that the company was not liable therefor under the policy of insurance issued and sued upon.

Issue was joined on the pleas and a trial had before a jury. There was no pretense, or claim, that the goods damaged were actually burned; on the contrary, it was

conceded that the entire injuries sustained were from the crushing of the chattels by the falling building.

The evidence of the case was substantially as follows:

The principal witness for the plaintiff was Joseph A. Oliver (Rec., p. 6). From his testimony it appeared that on the day of the occurrence referred to he was in charge of the plaintiff's store, No. 3108 M street; that a customer called for a particular piece of casting; there was no one to attend to the matter but witness, and that the casting required was in the cellar of the building. The witness went down the back cellar steps. He declares (Rec., pp. 7, 8 and 9):

> "On Monday, the 28th of September, Mr. Lenz, a customer, called for a particular piece of casting. No one was in the store but myself, and the casting called for was in the cellar. I went for it down the *back cellar steps.* It was about one o'clock in the day—when I went down there was no odor of gasoline in the cellar—I know the odor, which is pungent, unmistakable and easily detected. The particular piece of casting that was wanted was in a tier of bins in the shelving on the east side of the main cellar and about fifteen feet from the back cellar. It was so far from the door that I could not see it without the use of a light. On reaching the tier I struck a match and looked in the particular place where we were accustomed to keep this kind of casting; but it was not there. As I had been away from the store for three weeks previous and did not know to what bin in the shelves they had been moved, I started looking from one to the other, *beginning near the top.* The first match burned my fingers, and I dropped it, and lit another, with which I continued *my search down, when all of a sudden the place was enveloped or filled with this blue flame.* It was a bluish color, and I knew at once it was gasoline vapor had ignited. . . . Where it started I do not know, but the first I knew of it, it was all over the place and I was in the midst of it. I don't know distinctly whether the blaze started at my hand or

not. When I became conscious of the fact that there were flames there, it was all over the place; not only where I was, but all over the cellar. *I noticed it first all over the cellar.* There was no noise connected with it except the sh-sh-sh, like the swish of a whip or anything of that kind. I could see it play around. I became unconscious, either from the burns or the walls falling on me, I don't know which. The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. . . . I did not notice any fire in the back cellar as I went into the front cellar the day of the accident."

On cross-examination it appeared that one barrel of gasoline was put into the gasoline tank on Saturday, and on Monday (the day of the accident) four more barrels were delivered at the store and put into the same tank—that there was a slight odor of vapor when the gasoline was being drawn off.

> "There is always some slight odor from it" (Rec., p. 9). "After I dropped the first match and lit a second, *all of a sudden the place was enveloped in a flame*" (Rec., p. 9). . . . *"It came all at once."* "There was no fire in the furnace at the time, and had not been since the previous winter" (Rec., p. 10).

Other witnesses for the plaintiff testified that after the destruction of the building there was—

> "a little blaze oozing out quite near the back cellar steps, and coming from beneath a pile of rubbish" (Volkman, Rec., p. 10).

One of the witnesses for plaintiff was driving past the house, and—

> "there was a flash came out of what was called a cellar door, and there was a lot of tin cans and things

> fell out into the street." . . . "There was a rumbling noise" (Fearson, Rec., p. 21).

Another heard a noise something like a bad fire-cracker, and then pfeu-pfue—that blew out the wall. The report was just loud enough to hear a block away; something on that order (Sullivan, Rec., p. 21).

Another declared there was no report:

> "The noise which attracted his attention was such a noise as the rushing of large bodies of air through a small opening would make."

He further declared that he was in the street and was stung a good deal in the face with the dust and pieces of glass and that his horse was cut in five different places, and the front of his wagon littered with glass, putty and stuff (Galloway, Rec., p. 21).

Still others testified that they heard a crash but no report (Weaver and Blackford, Rec., p. 22).

On behalf of the defendant it was shown that on numerous occasions odor of gasoline vapor had been noticed, and complaints made (Bender, Rec., p. 17, and Artz, Rec., pp. 18–19).

It was further shown by the foreman of Engine Co. No. 5, that the engine house is a little over a square from the house destroyed. That he was sitting in front of the engine house and "heard an explosion"—went to the cellar of demolished building, looked in, and—

> "saw a can on a barrel, a pint cup, and there was a little blaze coming out of it, with something in it burning. That was all the fire there was."

On cross-examination this witness testified that—

> "the noise I heard was an explosion, like a lot of powder confined—boom! It did not sound like tinware and stoves tumbling down, but like an explosion. It said 'boom,' and made me start out of my chair" (Sullivan, Rec., pp. 17–18).

The testimony of above witness as to the insignificance of the fire, was corroborated by the Assistant Fire Chief (Kurtz, Rec., p. 18).

John W. Bailey, policeman on the beat in which house destroyed was located, says: His attention was drawn to the scene by—

> "a boom that sounded like those sundown guns at a distance. I turned immediately and saw Mr. Mitchell's wall fall out on the sidewalk" (Rec., p. 19).

Joseph H. Bradley also "heard an explosion" (Rec., p. 19). This witness and Bailey also testified to conversations with Oliver in which he is alleged to have made different statements as to the number of matches used at the time of the accident.

Two experts were produced on the part of the plaintiff (Howe, Rec., p. 13, and Munroe, Rec., p. 13), who testified to the explosive character of gasoline vapor when mixed with air in the proportion of 5 per cent of vapor to 95 per cent of air; and that the vapor sinks to the floor or ground. That very little gasoline vapor would be needed to create an explosion if mingled with a large proportion of air, etc.

The witness, Munroe, defined "an explosion" as—

> "the result due to conversion of a solid or liquid into a gas, or the expansion of a gas, which is accompanied with a loud report, and the shattering of the material about it."

When asked to draw the distinction between "a quick combustion" and "a slow explosion" he answered: "It is exceedingly difficult to draw a sharp line between any systems of classification" (Rec., p. 14).

This witness (Rec., p. 15) said:

> "From the testimony, as I heard it, I am of opinion that the building was prostrated through the combustion of some body there or substance there that burned rapidly, and that as a result of this rapid

> combustion, there being, according to Mr. Oliver's testimony, but a p–sh–ing sound in the burning, by the increased pressure the floor was raised to a slight extent, and then, by the condensation, there was a pressure brought to bear upon the upper surface of the floor, and then it gave way."

The case having been submitted to the jury a verdict was rendered for the defendant, upon which judgment was entered and appeal taken.

Appeal being heard in the Court of Appeals, the judgment below was affirmed and the case is brought here asking for a reversal of that judgment.

I.

The first assignment of error is to the refusal of the court to grant the first prayer asked for the plaintiff. This prayer is found on page 22 of the Record.

There can be no doubt that the prayer offered was properly refused.

It presupposed, and is based upon that presumption, that there is evidence in the case tending to show the existence of a fire in progress in the back cellar of the building demolished, "at or before the time the witness, Oliver, went into the cellar of the plaintiff's premises." It is submitted that there was, and is, absolutely nothing in the testimony of the case to warrant such a prayer. On the contrary, the testimony offered by the plaintiff negatives such an idea.

Oliver, who alone gives us any information bearing directly on the subject, declares in response to questions from attorney for plaintiff (Rec., p. 9): "I did not notice any fire in the back cellar as I went into the front cellar, the day of the accident." And he further precludes the probability of there being such fire by removing any possible cause therefor, in that he says (Rec., p. 10):

> "There was no fire in the furnace (in the back cellar) at the time, and had not been since the pre-

vious winter. It was a warm day and I was in my shirt-sleeves."

To have submitted this prayer to the jury would have tended but to mislead them, and it would have been manifestly unjust and unfair to the defendant to have permitted the jury to make it the basis for theorizing and speculation. Nor was the plaintiff injured in the rejection of the prayer referred to. The granting of the second prayer offered by the plaintiff gave him all that he could properly ask for. In this prayer (Rec., p. 23), the court tells the jury that if they find from the evidence that the commodities of the plaintiff—

> "were destroyed, or injured, or lost, *in the manner testified to by the plaintiff's witnesses*, and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured was the immediate result thereof then the loss was occasioned by fire, within the meaning of the policy, and the plaintiff is entitled to recover in this action."

This prayer granted everything the plaintiff was entitled to, and placed his case fairly with the jury. Under it, if they could find that the commodities of the plaintiff were destroyed or injured or lost in the manner testified to by the plaintiff's witnesses, they could render a verdict for plaintiff. This laid the whole matter before them, permitting them, if they found *a fire* of any origin, or at any time, from which the damage resulted, in front cellar or in the back cellar, to assess damages for the plaintiff; so that it really embodied the very instruction asked for in the prayer rejected. As will be seen from this and the other prayers of

the plaintiff, it was, and is, conceded that the goods of the plaintiff were not injured by an actual burning, and no effort was made to bring the plaintiff's claim within the clause of the policy which provides that even in the case of fire by explosion, should loss occur as result of a subsequent fire, the loss so occurring would be covered by the terms of the policy; for, as heretofore stated, it was conceded that the losses sustained were entirely from the weight of the falling building and its debris.

And again the court in its charge (Rec., p. 27) says:

> "The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire; for the explosion would be nothing but an incident to the fire."

Here again the jury are told that if they find from the evidence a fire on the premises at any time before the explosion, if there was an explosion, they might render a verdict for the plaintiff.

It my be claimed that as a matter of fact the court had not granted a prayer of the character mentioned by him. It is submitted that even should this be so, the statement of the court in his charge, as above, that he had done so, and his reiteration of the doctrine asked for, made his course a virtual granting of the prayer.

We can not see how, under all the circumstances, the appellant can, with any degree of fairness, claim that he was injured by the action of the court in reference to the prayer rejected.

The language of the Court of Appeals (Rec., p. 39) well expresses the reason for refusal of the first prayer:

> "The instruction undertook to direct the special attention of the jury, first, to the probable existence of an accidental fire in the rear cellar before the

entry of the witness, Oliver, into the front one, and, second, to the probable ignition of the vapor in the front cellar by that fire instead of by the match lighted by Oliver immediately before the explosion, which took place in the front cellar. Neither of these inferences seemed to have any reasonable foundation in the evidence, and the second is directly opposed to the testimony of Oliver, upon which the plaintiff's case rests. Had this been the only issue in the case, the court might, without error, have directed a verdict for the defendant."

II.

The second assignment of error is to that portion of the charge to the jury (Rec., p. 26) wherein the jury are instructed that gasoline was not one of the articles covered by the insurance, but that the privilege to keep five barrels thereof, inserted in the policy, was to offset the forfeiture of the same under its provisions, had the privilege not been granted, and was not intended as an insurance of the same. This exception should not prevail.

This charge was made to meet the claim insisted upon by plaintiff, that gasoline and its vapor were amongst the commodities insured under the policy issued by the defendant company. The ground upon which this claim was based is the language of the clause inserted into the policy as follows (Rec., p. 5): "Privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor."

A fair reading and interpretation of the policy, as a whole, clearly negatives this contention and fully justifies the charge complained of. The policy, the contract between the parties, positively provides that in the event the insured carries naptha, benzine, etc., in quantities exceeding one barrel, at any one time, without written consent of the insurer, *the policy shall be void.*

The insured wishing to sell gasoline, the commodity excluded in excess of one barrel upon penalty of voidance of

policy, secures the written consent, which reads as above. Had gasoline to the extent of five barrels been amongst the commodities *insured*, no such permit would have been necessary. As the policy stood, had the written consent not been obtained, and a fire have occurred, while more than one barrel of gasoline was on the premises, even though there had been a total loss of the insured's goods by fire, or otherwise, no recovery could have been had, for the policy, by its own terms, would have been void, absolutely. The very act of the insured in asking for the permit, shows that he recognized, and appreciated, the full force of the voiding clause of his policy. The privilege granted him, and for which he paid, was to keep the additional amount of gasoline without forfeiting his remedy in case of fire and loss. The consideration proceeding from the company, in addition to the privilege granted, was the increased risk incurred by permitting so large a quantity of gasoline to be upon the premises. If it is to become liable for an explosion caused by a preceding fire, or for the damage by fire ensuing an explosion so occurring, it can be readily seen that the presence of such a large quantity of gasoline increases immensely the probability and possibility of explosions and the consequent additional fury and destructiveness of any conflagration that might occur, fed, as it would be, by so combustible a material as gasoline. All of which risk the insurer agreed to run, for the additional premium paid. The policy declares that the mere presence of more than one barrel of gasoline will render the same void. By the new privilege granted the company assumes, therefore, a risk from which it was entirely exempt, theretofore. The privilege is a modification of the responsibility. It operates as a division and mutual distribution between the insurer and the insured of the extra risk resulting from the granting on the one part and the exercise on the other, of the privilege. Taking the original contract and the privilege together they mean simply that the company says

to the insurer, we will agree that the mere presence of more than five barrels of gasoline on the premises, or its use in your business, shall not vitiate the policy, but if it shall be the actual primary cause of any loss, we will not be held responsible. Such an arrangement was not open to legal objection, but is one the parties had full right to make, and did make. It does not cast the entire risk upon either, but divides it between them. If a fire occur from some other cause, and in consequence of the presence of gasoline, within the privileged limit upon the premises, it is aggravated, and made more destructive than it would otherwise have been, the loss falls upon the insurer. In this view of the case, which we submit is the true one, the charge of the court was most appropriate and we adopt it as part of our brief, with great confidence as to its propriety and correctness.

The contention made by appellant that gasoline was one of the commodities which he was privileged to keep and sell in his store, without special leave granted by the company, could hardly be seriously considered by the court in view of the fact that the policy itself shows that no such belief was entertained by the appellant as he applied to and received from the company the privilege to keep gasoline, paying for such privilege, thereby positively negativing the idea that he had the privilege to keep the same.

The Court of Appeals (Rec., p. 42) on this point says:

> "This privilege, given in writing, in strict accord with the printed forfeiture clause, shows conclusively that the plaintiff was informed of that clause, and believed that his policy would become void if he should keep more than one barrel of gasoline in his storehouse. Desiring to keep more than one barrel, and not more than five, he asked for the privilege, paid for it, and had it entered in writing in the body of the policy. The court was right, therefore, in telling the jury that this privilege has been inserted to avoid the forfeiture that would otherwise arise through violation of the prohibitory clause."

III.

The third assignment of error is the refusal of the court to grant the third prayer asked for by the plaintiff (Rec., p. 23).

It will be observed that this prayer asks the court to say to the jury, that if it shall appear, from the evidence, that a liability to explode is one of the incidents of gasoline vapor under certain conditions, they must assume that the insurer, in issuing its privilege to keep the same, must have contemplated the effects fire might, or would naturally have produced on such vapor, and that therefore the plaintiff is entitled to recover if damage to plaintiff's goods were occasioned by an explosion of gasoline vapor, having its origin in fire. The object of the prayer, undoubtedly, is to say that the defendant can not claim as a defense, that an *explosion* was the cause of the injury sustained, because by the act of permitting the use of the commodities the explosion of which caused the damage, it also agreed to assume and answer for the risk of the result naturally following the contact of such commodities with fire. If this be not the object, then there can be no complaint because of the rejection of the prayer, for so far as the latter part of the prayer is concerned, wherein the court is asked to charge:

> "And if the jury further find, from the evidence, that the prostration of the building in which the insured articles were stored and the resulting damage to such articles were occasioned by an explosion of gasoline vapor having its origin in fire, the plaintiff is entitled to recover in this action,"

that was already granted in the first prayer, wherein the court says, that if a fire was in progress which originated the explosion, prostrating the building, then the damage done to plaintiff's commodities by reason of such prostration may be considered as occasioned by fire within the meaning of the policy, and recovery can be had.

Under the contract of insurance the attempt to fix

liability upon the insurer for an explosion not induced by a pre-existing fire, must fail; for by again referring to the policy (Rec., p. 6) we find that the distinct agreement between the insurer and the insured was that there should be no liability under the contract for loss caused by lightning, *or explosions of any kind unless fire ensues, and then for the loss or damage by fire only.*

As above set forth there is no claim or pretense that any injury was done to the commodities of the plaintiff from fire *ensuing* the explosion, and surely if there is anything in the contract between the parties the plaintiff is precluded from making any demand for injuries resulting from other causes than fire, unless the explosion was the direct incident to a pre-existing fire within the meaning of the policy, or fire followed, causing damage to the stock, and then only for the injuries directly resulting from such fire.

We have already, in considering the assignment of error No. 2, endeavored to show the bearing and effect of the provisions of the original policy and the privilege granted, taken together, upon the liability of the defendant company, which reasoning would apply to the present assignment with equal force.

IV.

The fourth assignment of error is to the granting of the second, third and fourth prayers of the defendant (Rec., p. 24).

These prayers are to the effect:

(*a*) That a lighted match in the hand of, or dropped by, an employee of the plaintiff, from which an explosion is caused, resulting from ignition of vapors from oil or gases, is not to be considered "fire" in the meaning of the policy sued on.

(*b*) That if the loss was caused solely by an explosion or ignition of explosive matter, not caused by a preceding fire, the plaintiff could not recover.

(c) If an explosion occurred from contact of escaping gases with a match held by an employee of the plaintiff and the loss occurred solely from such explosion, the verdict should be for defendant.

These prayers were in accordance with the best authorities.

Heuer *vs.* Northwestern National Insurance Co. of Milwaukee, 144 Ill. 393, is a well considered case and in it the questions involved here are discussed.

By turning to the provisions of our policy it will be found (Rec., p. 6) that they are similar to those involved in the case above referred to. In that case there was an agreed statement of facts to the effect—

> "that there was an explosion in the building demolished; that the explosion was produced by the lighting of a match in the cellar of the building which was filled with illuminating gas, and that the damage was a damage by the explosion produced in this manner, but was not a damage produced by the burning of the property insured."

Now, our prayers are predicated upon the jury finding, from the evidence, that there was no fire pre-existing the lighting of the match by the witness, Oliver; that the lighting of said match ignited the escaping vapor from the gasoline in the cellar, and instantaneously produced the explosion. In the above cited case the court says (page 396):

> "It is conceded that no fire ensued from the explosion, and that the goods were not burned by fire, but were damaged by the falling of the floor, which was produced by the explosion. If, therefore, the loss was in any sense the result of fire, such fire could only have been the flame of the match, which came in contact with the illuminating gas. Is the loss to be attributed to the explosion, or to the lighting of the match, which preceded the explosion? If it is attributable to the explosion, the loss is not covered by the policy, and the company can not be held liable."

The court further says (397):

> "The exemption clause provides that 'this company shall not be liable . . . for any loss caused by . . . explosion of any kind unless fire ensues.' The use of the expression 'explosion of any kind' contemplates the existence of more than one kind of explosion. Without undertaking to make an accurate classification, we deem it sufficient to say, that one kind of explosion is that which is produced by the 'ignition and combustion of the agent of explosion,' as where a lighted match is applied to a keg of gunpowder, and another kind of explosion is that which does not involve 'ignition and combustion of the agent of explosion' as where steam or any other substance, acts by expansion without combustion. The exemption clause is broad enough to embrace both kinds of explosion. As the present case, where it appears that a lighted match was applied to the illuminating gas confined in the basement of a building, furnishes an instance of the first kind of explosion above specified, it manifestly comes within the terms of the exemption."

And the court proceeds to say (397) that—

> "It is a well-settled principle in the law of insurance that the proximate, and not the remote, cause of the loss must be regarded in order to ascertain whether the loss is covered by the policy or not."

Applying this doctrine to the present case, where the lighted match was applied to the escaped gases and an explosion thereby occurs, which causes damage, but is not followed by combustion, the explosion is the proximate cause of the injury, and the lighted match is only the remote cause. In such case, fire does not reach the property injured, but the concussion resulting from the explosion does the damage and is the proximate cause.

In our case the goods injured were not brought in contact with the fire produced by the lighting of the match, but with the explosive power of a fireless concussion, which

caused the floor and walls of the store of the plaintiff, in which the goods were located, to fall, and thereby occasioned the damage.

In Transatlantic Fire Insurance Co. *vs.* Dorsey, 56 Md. 70, the suit was on a policy containing a clause of exemption from liability for any loss that might be sustained from certain specific causes, amongst them any loss caused by the explosion of gunpowder, or any explosive substance, or explosion of any kind, unless fire ensues, and then for the loss or damage by fire only. In that case the court held that if any loss was sustained by fire that ensued the falling of the building, the company was liable, even though the fire had originated in an explosion, or where fire has pre-existed the explosion and had caused the same, the company was liable for all damages resulting, even though there was no loss by an actual burning. But the court held that it was the province of the jury to determine in such cases whether there has been an explosion, how, and by what means produced, and whether the loss sustained was directly caused by explosion, or by an antecedent fire, within the risk assumed by the insurers.

All these questions were fairly submitted to the jury, and we must assume, from their verdict, they found that there was no antecedent fire, but that the match exploded the escaping vapors, and that, as was conceded, all damages resulted from the fall of the building, and none from ensuing fire.

In Briggs *vs.* The Insurance Co., 53 N. Y. 446, the policy was upon certain machinery used for rectifying spirits. It contained a clause similar to that of the policy now sued upon. Vapors escaped from the works and came in contact with the flame of a lighted lamp in the room, and an explosion ensued which nearly destroyed the building and machinery. A fire resulted which occasioned some damage, but small in comparison with that caused by the explosion. The Court of Appeals held that the contact of the vapor in

the room with the burning lamp was not a fire within the meaning of the risk assumed, and while it was held that the company was liable for the damages done by the fire which followed the explosion, it was held not to be liable for the loss occasioned by the explosion itself.

In Insurance Co. *vs.* Foote, 22 Ohio State, 340, it was also held that a lamp causing explosion of vapors was not a "fire" within the meaning of the policy sued on.

In view of the authorities cited, and of the cases discussed therein, surely the fourth assignment of error has no standing.

V.

The fifth assignment of error is to that portion of the charge of the court in which the jury are told that the word "explosion" is to be understood in its ordinary and popular sense.

The language of the court (Rec., p. 27) was proper and in accordance with authorities. The language used is substantially that of the Court of Appeals of Maryland in 56 Md. 82 (above cited). Speaking of the word "explosion" in the policy sued on in that case, the court says (82):

> "There is often difficulty experienced in these cases, in accurately defining the term 'explosion.' . . . We must suppose that the term was employed in the policy *in its ordinary and popular meaning* and it is a question for the jury to determine, in all such cases whether there has been an explosion."

And in Heuer *vs.* Insurance Co., 22 Ohio State, 348, the court said:

> "An explosion may be described generally as a sudden and rapid combustion, causing violent expansion of air, and accompanied by a report. But the rapidity of the combustion and the violence of the report vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, *and the true meaning of the word, in each particular case, must be settled, not by any fixed standard, or*

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accurate measurement, but by the common experience and notions of men in matters of this sort."

VI.

We submit that there was no error committed in the trial of the cause of which the appellant can complain, or by which his interests or rights were jeopardized. He had a full and fair hearing; he received every prayer and charge he was entitled to; he had a free field for the oratory of his counsel before the jury, and the latter decided that he had no case; and their verdict was borne out by the evidence.

In conclusion we ask attention to the language of the court in the case in 22 Ohio St. 81, 348, which applies with equal force to the present suit as it is presented in the Record:

> "The proof unquestionably shows that the origin of the fire and the explosions were simultaneous. It may be true, in a strictly scientific sense, that all explosions caused by combustion are preceded by fire. The scientist may demonstrate, in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precede explosion; but the common mind has no conception of such combustion as a fact independent of the explosion, when they concur in such rapid succession that no appreciable space of time intervenes. The terms of the policy must be taken in their ordinary sense."

And we may read in connection with the above, the statement of the witness Monroe (Rec., p. 14), when asked to draw, for the benefit of the jury, the distinction between "a quick combustion" and "a slow explosion" that "it is exceedingly difficult to draw a sharp line between any system of classification."

J. HOLDSWORTH GORDON,

Attorney for Appellee.

Supreme Court of the United States.

No. 51.—October Term, 1901.

Milton C. Mitchell, Plaintiff in Error,
vs.
The Potomac Insurance Company of Georgetown, D. C.

In error to the Court of Appeals of the District of Columbia.

[November 11, 1901.]

Mr. Justice Peckham delivered the opinion of the Court.

This is an action brought by the plaintiff in error upon a policy of insurance issued by the defendant. On the trial the insurance company had a verdict upon which judgment was entered, and the Court of Appeals of the District of Columbia having affirmed it, (16 App. Cas. D. C. 241,) the plaintiff has brought the case here. The policy was for $5,000 on the plaintiff's stock in trade, which was destroyed on September 27, 1896. The property insured was described in the written part of the policy as follows:

"On his stock of stoves and their findings, tins and tinware, tools of trade, and such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C.

"Privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor."

The policy also contained the following printed indemnity clause:

"Against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided. . . ."

In finer print are the following conditions and exceptions among others:

"It being convenanted as conditions of this contract that this company . . . shall not be liable . . . . for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only.

"Or, if gunpowder, phosphorus, naphtha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid or refined coal or earth oils are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time without written consent, . . . this policy shall be void."

The damage to the insured stock amounted to $4,568.50 and was due to the falling of the building and the crushing of the stock as hereafter detailed. The defendant denied liability on the ground that the falling of the building and injury to the stock had been caused solely by explosion, no fire ensuing, and was therefore excepted from the policy.

An extra premium was charged for the gasoline privilege.

The plaintiff in error conducted a business at 3108 M street, Georgetown, D. C., in a two-story-and-attic brick structure, his stock consisting of stoves and tinware, and he did besides a general repairing business. There was a cellar under the building divided into two compartments by a division, with room for a doorway, but there was no door between the divisions. The gasoline which the insurance policy permitted the plaintiff to keep was stored in the cellar in a tank underneath the back cellar floor. Customers were supplied with gasoline from a pump which was operated in the back of the store above the cellar where the gasoline tank was. There were no gas jets in the cellar, and no artificial lighting of any kind. When near the door one could see without the use of a match, or candle, or any other light, but when seven or eight feet away it was necessary to have artificial light of some kind. In the front cellar stove castings and brick, surplus stoves and ranges were kept. Along the sides shelving was arranged upon which brick and castings were put. No trouble had been experienced with gasoline vapor on account of the furnace which was in the cellar, or from matches or candles which were used to light persons about. There was no fire in the furnace at the time of the loss. Frequently half a dozen candles were around on the floor when work was to be done. The back cellar was used for the same purpose as the front cellar, except that stoves were not put in there; it was lighted only by a small window looking out into the alley. Matches and candles were used in the back cellar as in the front. When the workmen found what they were looking for, it was customary to drop these charred matches upon the floor, or put them on the stoves or castings.

The clerk who went into the cellar on the occasion testified in regard to the disaster as follows:

"It was about one o'clock in the day. When I went down there was no odor of gasoline in the cellar. I know the odor, which is pungent, unmistakable and easily detected. The particular piece of casting that was wanted was in a tier of bins in the shelving on the east side of the main cellar and about fifteen feet from the back cellar. It was so far from the door that I could not see it without the use of a light. On reaching the tier I struck a match and looked in the particular place where we were accustomed to keep this kind of casting; but it was not there. As I had been away from the store three weeks previous and did not know to what bin in the shelves they had been moved, I started looking from one to the other, beginning near the top. The first match burned my fingers, and I dropped it and lit another, with which I continued my search down, when all of a sudden the place was enveloped or filled with this blue flame. It was a bluish color, and I knew at once that it was gasoline vapor that had ignited. I knew it at once because I remembered the appearance of it—had seen it before. Where it started I do not know; but the first I knew of it, it was all over the place and I was in the midst of it. I don't know distinctly whether the blaze started at my hand or

not. When I became conscious of the fact that there were flames there, it was all over the place; not only where I was, but all over the cellar. I noticed it first all over the cellar there was no noise connected with it, except the sh-sh-sh like the swish of a whip or anything of that kind. I could see it play around. I became unconscious, either from the burns or from the walls falling on me, I don't know which. The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and, knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. I crawled towards the front, where I was pulled through the front wall. I had been protected from the debris by the way in which the joist fell. They broke in the middle, one end remaining on the east wall and the other resting on the floor, thus leaving a little angle at the side. This condition existed all the way to the front of the building. It was very dark—like the darkness of Egypt. The brick work was shattered in front and the house had fallen down."

Plaintiff in error claimed on the trial that there was evidence of a fire in the back cellar preceding the explosion and causing it, and that the explosion was therefore but an incident in the progress of the fire, and the company was therefore liable on the policy. He made the following request to charge the jury:

"If the jury find from the evidence that on the 28th day of September, 1896, at or before the time the witness Oliver went into the cellar of the plaintiff's premises, as described by him, a fire originating in accidental or other causes was in progress in the back cellar of said premises, and that afterward and while such fire was in progress the gas or vapor generated by the evaporation of liquid gasoline came in contact with the flames of such fire and exploded and prostrated portions of the building in which the insured commodities were stored, then the damage done to such commodities by reason of such prostration was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

The court refused the request, and the exception to such refusal brings up the first question argued by the plaintiff in error.

In the course of the charge it was stated as follows:

"The court has granted an instruction to this effect, that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, but if the explosion were not an incident to a precedent fire, but was the origin and the direct cause of the loss, then there was no destruction by fire, and the plaintiff is not entitled to recover anything from the defendant."

It is not important to inquire whether there was in truth any evidence tending to prove the existence of a fire in the front cellar preceding the lighting of the match therein, because the submission of the question to the jury was all that the plaintiff could ask, and the verdict negatives its existence. But the court drew a distinction between the front and rear

cellar, and refused the foregoing request by the plaintiff's counsel, for the reason given, as follows:

"The court was asked to instruct you with reference to the theory that there was a precedent fire in the back room. The court felt obliged to refuse such an instruction, because there is no testimony in the case that would justify the jury in reaching the conclusion that before Mr. Oliver struck that match there existed a fire in the rear portion of that cellar. There is no testimony and no evidence of the fact."

The court also charged as follows:

"It is not contended that any fire followed the explosion, and that any portion of this stock in trade was injured by a subsequent fire, but it is claimed by the plaintiff that there existed a precedent fire, and that the explosion was an incident of that precedent fire. The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to fire."

The court also charged:

"Now the question for you to determine in the light of all this testimony and your own knowledge and experience is this: Was the falling of this building and the injury to the stock in trade contained within it due to an explosion or not? If it was, and there was no antecedent fire, the verdict should be for the defendant. If you find in the case evidence that there was an antecedent fire, which did not amount to an explosion, but which was simply rapid combustion, which resulted in a collapse of the building and not in an explosion, then it is conceded that the plaintiff is entitled to recover such damages as you shall find that he sustained. If you find a verdict for the plaintiff, you ought to give him interest on the amount to which he is entitled from the 19th day of January, 1897. You may take the case, gentlemen."

With relation to the denial of the request of plaintiff's counsel, the Court of Appeals, in the opinion delivered by Mr. Justice Shepard, said:

"The instruction undertook to direct the special attention of the jury first, to the probable existence of an accidental fire in the rear cellar before the entry of the witness Oliver into the front one, and second, to the probable ignition of the vapor in the front cellar by that fire instead of by the match lighted by Oliver immediately before the explosion, which took place in the front cellar. Neither of these inferences seemed to have any reasonable foundation in the evidence, and the second is directly opposed to the testimony of Oliver, upon which the plaintiff's case rests. Had this been the only issue in the case the court might, without error, have directed a verdict for the defendant. (*Gunther* v. *Liverpool &c. Ins. Co.*, 134 U. S. 110, 116.)" And also *Griggs* v. *Houston*, (104 U. S. 553.)

A careful persual of the evidence in the case brings us to the same conclusion. There was no evidence of any fire in the back cellar preceding the lighting of the match in the front cellar, and it would have been error to submit such a question to the jury for that reason. The request was therefore properly denied.

It is also contended that gasoline being kept for sale by the insured in his store, was covered by the written language of the policy, which included not only his stock of stoves, &c., but also "such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C." It is then argued that as gasoline is in its nature explosive, the risk arising therefrom was covered by the policy, and the loss occasioned thereby was one for which the company was liable, and if the printed provisions of the policy provided otherwise they are inconsistent with the written part of the policy, and the latter must prevail. This construction would render unnecessary the privilege to keep not more than five barrels of gasoline, which is also written in the policy. We think the construction contended for is inadmissible.

The language of the policy did not insure the plaintiff upon any property which he might choose to keep and sell in his store. The language means not only the particular property specifically described, but such other goods as are kept for sale in a first-class retail stove and tin store, which in this case was situated as stated in the policy. Identifying the store by naming its situation does not alter the significance of the language, in effect, prescribing that the goods are such as are kept for sale in a first-class retail stove and tin store. The "other goods" must be such as are ordinarily, usually, customarily kept for sale in a first-class retail stove and tin store, and not such other classes of property as the insured may then or at any time choose to keep for sale in his particular store. This we think is the plain meaning of the language. The cases cited in the opinion delivered in the Court of Appeals make this plain, if anything more than the language itself were wanted for that purpose. Unless gasoline is such a commodity as is usually kept for sale in a first-class retail stove and tin store, it would not be included in that language. There is no evidence showing that gasoline is thus usually kept, and without evidence to that effect it cannot be presumed that such is the fact. The language which immediately follows, "privilege granted to keep not more than five barrels of gasoline or other oil or vapor," also tends to show quite conclusively that the parties did not consider the description already given of the property insured, as permitting the keeping and selling of gasoline, for otherwise the privilege would not have been necessary to be inserted in the policy.

Taking the written and the printed language of the policy together, and there is no inconsistency therein. The extent and limits of the insurance are, as stated in the printed provision, "against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured;" and there is the further condition, "it being covenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only."

The written part insured the plaintiff on property therein described, which does not cover gasoline in the description of "other goods." What the insurance is and its limits are stated in the printed portions. Taking all the language together, the written and the printed, the contract is plain and unambiguous, without inconsistency or contradiction between the written and printed portions thereof, and therefore there is no room for the application of the principle that where such inconsistency or ambiguity exists the written portion prevails.

In regard to the keeping of gasoline for sale and the reason for writing the privilege to so keep it in the policy, and the effect thereof, the court charged as follows:

"You hardly need be told, I think, as ordinary business men, that a privilege to keep something does not bring the privileged article within the articles insured by the policy. Suppose that clause read 'privilege to keep not more than fifty pounds of gunpowder,' on the premises, and the party insured was keeping a dry goods store or a drug store, would it be contended by any sensible man that the gunpowder was an article insured by the policy? Clearly this privilege to keep was inserted to offset the forfeiture of the policy if the provision contained in this policy were violated without this privilege, and that provision is this:

"If gunpowder, phosphorus, naphtha, benzine or crude earth or coal oil are kept on the premises, or if camphene, burning fluid or refined coal or earth oils are kept for sale, stored or used on the premises in quantities exceeding one barrel at any one time, without written consent of the company, the policy should be void.

"So that if these five barrels of gasoline were kept upon those premises without the written consent of the company, the policy would have been absolutely forfeited and the plaintiff would not have been entitled to recover damages for loss if the whole stock had been destroyed by fire. (1) So it must be believed that the plaintiff, when he took his policy, fully understood what its terms and provisions were. That is the reason that he asked for, received and paid for this privilege of keeping not more than five barrels of gasoline on the premises. I suppose that inasmuch as keeping such inflammable material upon the premises would naturally increase the risk of loss, the insurance company would require the payment of a larger premium than it would have required if such inflammable material were not kept on the premises."

We regard this part of the charge as unexceptionable.

The plaintiff also claims that error was committed by the court in charging the jury, at the request of the defendant, in substance:

(1) If the loss was caused solely by an explosion or ignition of explosive matter, not caused by a precedent fire, the plaintiff cannot recover.

(2) If an explosion occurred from contact of escaping vapor with a match lighted and held by an employee of the plaintiff, and the loss resulted solely from such explosion, the verdict must be for the defendant.

(3) A match lighted and held by an employee of the plaintiff coming in contact with the vapor and causing an explosion is not to be considered as "fire" within the meaning of the policy.

We think each instruction was correct. A loss occurring solely from an explosion not resulting from a preceding fire is covered by the exception in the policy. And an explosion which occurred from contact of escaping vapor with a lighted match, under the facts stated, would also plainly come within the exception of the policy. Also a lighted match is not a "fire" when used as stated in the above third clause of the charge. (*United Life &c. Insurance Company* v. *Foote*, 22 Ohio St. 340; *Transatlantic &c. Company* v. *Dorsey*, 56 Md. 70; *Briggs* v. *Insurance Company*, 53 N. Y. 446, 449.)

Exception was also taken to the charge of the judge explaining the meaning of the word "explosion" as used in the policy. Upon that the court charged:

"Now, gentleman of the jury, when the word 'explosion' was used in the policy, the company as ordinary men—at least its officers were ordinary men and not, as I assume, scientific men—and the party insured an ordinary man, are presumed to have understood the word 'explosion' in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word. And, after all, the question here being explosion or non-explosion, is, what do you, as ordinary men, understand occurred at that time in the light of all the testimony? Was it an explosion in the ordinary and popular sense of that word, or was it a fire with a subsequent explosion or a subsequent collapse of the building as a sequence to the fire?"

The plaintiff claimed there was some evidence that the collapse of the building was the result, not of explosion, but of rapid combustion of the gasoline vapor, which first expanded the atmosphere of the cellar, and then, through cooling, produced a vacuum that caused the crushing in of the floor by the unresisted pressure of the external atmosphere.

With reference to that contention the court charged:

"If the jury believe from the evidence that on the 28th day of September, 1896, the commodities of the plaintiff mentioned in the policy of insurance, offered in evidence, were destroyed or injured or lost in the manner testified to by the plaintiff's witnesses, and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured was the immediate result thereof, then the loss was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

We think these two extracts from the charge of the judge fairly presented the question to the jury, and the exception to the charge is not available.

We find no error in the case, and the judgment of the Court of Appeals is *Affirmed.*